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The power of courts to compel the giving of expert testimony without extra compensation has long been a subject of judicial controversy. Whether expert witnesses can be compelled to testify as to facts of science with which they have become familiar by means of special study and investigation when no other compensation has been tendered than the usual fees of witnesses testifying to ordinary facts, is a point upon which the cases are not in harmony. In this country the cases are nearly balanced, and the question must be regarded as still an open one, although the weight of authority rather inclines to the theory that the expert may be required to answer without additional compensation. A recent Illinois case reaches that conclusion. In Dixon v. People, 48 N. E. Rep. 108, it was held that a physician, who has been subpœnaed and is interrogated as an expert witness, may be punished as for a contempt for refusing to give expert testimony, although no compensation greater than that allowed an ordinary witness by statute has been paid or promised him. This is in harmony with what has been known as the leading case on the subject—*Ex parte* Dement, 53 Ala. 389—wherein the Supreme Court of Alabama denied the right to extra compensation in such cases. Some of the cases asserting the right of the expert to extra compensation do so upon the ground of property right acquired by the expert in knowledge as to particular science which it is in derogation of constitutional principles to take from him without special compensation. This was the view of the Supreme Court of Indiana, in Buchman v. State, 59 Ind. 1. As to this point the Illinois court says that "it is not exactly accurate to say that the mere abstract knowledge acquired in the study of a special employment is of itself property. It is the right to apply that knowledge to the accomplishment of a particular result which constitutes property. For instance, if the appellant had been required to answer a question put to him with a view of prescribing a remedy for the relief of Mrs. Purdy, the plaintiff in the suit in which he was called to testify as a witness, then it might be said, if he was not offered any compensation, that he was deprived of a property right. But where a physician is asked a hypothetical question, and is called upon to give his opinion upon the facts stated in the hypothetical question while he is testifying as a witness in court, he is not thereby required to practice his healing art. He is merely making a statement for the purpose of enabling the court and the jury to understand correctly a case which is before the court. There is no infringement here of a property right. It may be conceded that in a certain sense the knowledge of the physician, acquired by special study, is property; but the question here is, not so much whether certain knowledge is property, as whether the requirement that he shall answer a hypothetical question is a taking of his property. Where he is required to make an application of his knowledge to a particular case, so as to secure a particular result — such as, for instance, the curing of a disease or the healing of a wound—then he would undoubtedly be entitled to compensation. A physician or surgeon cannot be punished for a contempt for refusing to make a post-mortem examination unless paid therefor; nor can he be required to prepare himself in advance for testifying in court, by making an examination, or performing an operation, or resorting to a certain amount of study, without being paid therefor. But when he is required to answer a hypothetical question, which involves a special knowledge peculiar to his calling, he is merely required to do what every good citizen is required to do in behalf of public peace and public order, and in promotion of public good." In some few States there will be found express statutory provisions on the subject of the compensation to be made to expert witnesses. The tendency of such legislation has been in the direction of securing to such witnesses the right to extra compensation if in the discretion of the court it should seem proper that such extra allowance should be granted. In some States, as for instance in Iowa, the language of the statute is that the expert "shall receive" additional compensation to be fixed by the court. In other States the statute reads that such witnesses "may be allowed" extra compensation if the court deems it just and reasonable.

This is the provision of the Minnesota statute. On the other hand it has been provided in at least one State that such witnesses may be compelled to testify without any extra compensation. This is true in Indiana.

NOTES OF IMPORTANT DECISIONS.

BUILDING CONTRACT — ALTERATION — DISCHARGE OF SURETIES.—In City Council v. Ormond, 28 S. E. Rep. 147, the Supreme Court of South Carolina considered the rights and liabilities of sureties on building contracts and the effect upon such sureties of a material alteration in the contract. The court held that where a building contract provides for a 10 per cent. reserve, voluntarily paying the same to the contractor before he is entitled thereto, and without his sureties' consent, is such a material alteration of the contract as releases the sureties, regardless of the question of their possible benefit; that where a contract provided that a principal should loan its credit to the contractor to purchase supplies used in completing the work, and that a sum equal to the amount of such credit should be reserved out of the contract price, the principal cannot pay the entire contract price, and look to the contractor's sureties for the amount of such credits, since the principal is a trustee, for the benefit of such sureties, of such sum as should have been reserved, and cannot make disbursements thereof without the sureties' consent, and that where a contract originally provided that "ten per cent. of the amount due should be retained until the satisfactory completion of the contract," and an amended contract was made allowing certain credits given by the principal to be deducted from the contract price, "including the ten per cent. reserved," the amended contract is not separate and distinct from the original, but only gives the principal the right to deduct such credits from the 10 per cent. reserve, and does not release such principal from its obligation to reserve such amount for the benefit of the contractor's sureties.

CONSTITUTIONAL LAW — NUISANCE — LAUNDRIES.—In a proceeding entitled *In re* Hong Wah, 82 Fed. Rep. 623, before the United States District Court for California, it appeared that a city ordinance provided that it should be unlawful for any person to establish, maintain, or carry on the business of a public laundry, where articles are washed and cleansed for hire, within a city, except in certain designated localities, and declared any such laundry established or carried on in violation of this provision a public nuisance, and the violation of the ordinance a misdemeanor punishable by fine or imprisonment. It was held that the ordinance was in contravention of the fourteenth amendment of the constitution of the United States. The court said that "the right to use property in the prosecution of any business which is not dangerous to others, nor injurious nor offensive to persons within its vicinity, is one of the legal attributes of the ownership of property, of which the owner cannot be deprived by the arbitrary declaration of any law of the State, or municipal ordinance; nor can the right of any person to engage in any useful occupation, not a nuisance *per se*, at such place as he may choose for that purpose, be denied by any law or ordinance. These are the fundamental principles underlying the decision in *Ex parte* Whitwell, before referred to, and the rule of law as thus declared is entirely inconsistent with the previous case of *In re* Hang Kie, 69 Cal. 149, 10 Pac. Rep. 327, unless the business of conducting a public laundry is to be deemed and treated as a nuisance *per se;* and that such business cannot be so regarded was not only decided in the cases first cited in this opinion, but also by the Supreme Court of California in *Ex parte* Sing Lee, 96 Cal. 354, 31 Pac. Rep. 245. It is certainly a matter of common observation that a public laundry is harmless in itself, and, if properly conducted with reference to sanitary and other conditions which may easily be complied with, not offensive or dangerous to the health of the community in which it may be located; and this being so, a person has, under the constitution of the United States, the same right to engage in the business of conducting a public laundry as in any other, and has, equally with the grocer, the lawyer, or carpenter, the right to select the particular locality in which he shall conduct such business. The ordinance in question denies this right, and is for that reason in conflict with section 1 of the fourteenth amendment to the constitution of the United States; and the conflict is not removed by the fact, alleged in the return, that there are within the limits of the city of San Mateo, outside of the district from which laundries are excluded, places equally as well suited for their location as any within the district from which they are excluded. As already stated, a person desiring to carry on such a business has the right to select his own location, and cannot be required to go elsewhere."

SALE—WARRANTY—BREACH — NOTICE.— The case of Gaar, Scott & Co. v. Hicks, 42 S. W. Rep. 455, decided by the Court of Chancery Appeals of Tennessee, decides some interesting questions relating to warranty on sale of machinery. The points decided by the court are: 1st. Where a clover huller is sold, together with a carriage for moving it from farm to farm, a warranty of "the machinery" so sold covers the carriage. 2d. No breach of a warranty that a carriage is fit to transport a clover huller from farm to farm is shown by the fact that an arched sill, forming part of such carriage, broke while the carriage was being hauled with another vehicle, which was chained to the rear axle, and materially in-

creased the strain on the sill. 3d. Where a contract of sale of machinery provides that, if it fails to fill the warranty, notice shall be given to the seller at his home office in another State, notice to the local agent is insufficient. 4th. Where a contract of sale of machinery provides that, if it fails to fill the warranty, a reasonable time shall be allowed the seller to remedy the defects, the purchaser, on the breaking of a part, has no right to abandon the machinery and refuse to pay for it.

CRIMINAL LAW — CONSTITUTIONAL GUARANTIES—DEFENDANT MANACLED IN COURT.—In State v. Williams, 50 Pac. Rep. 580, decided by the Supreme Court of Washington, it appeared that defendant was brought into court, and kept there, in manacles, until, upon protest of his counsel, they were removed, but not until a considerable period of time had elapsed. During the trial a view of the premises alleged to have been burglariously entered by defendant was ordered at the State's request. Defendant was manacled in the presence of the jury, and ordered by the court to go, and did go, to the premises with the jury. No reason appeared in the record for such treatment. It was held, reversing the trial court, to be in violation of Const. art. 1, § 22, providing that "in criminal prosecutions the accused shall have the right to appear in person." The court cites with approval the leading American case on the subject, State v. Kring, 64 Mo. 591, wherein the supreme court, in reversing the lower court, says: "We have no doubt of the power of the criminal court, at the commencement or during the progress of a trial, to make such orders as may be necessary to secure a quiet and safe one; but the facts stated by the court in this case, as shown by the record, that the prisoner had assaulted a person in court about three months before the term at which he was tried, would hardly authorize the court to assume that on his trial for life he would be guilty of similar outrages. There must be some reason, based on the conduct of the prisoner at the time of the trial, to authorize so important a right to be forfeited. When the court allows a prisoner to be brought before a jury with his hands chained in irons, and refuses, on his application or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers. Besides, the condition of the prisoner in shackles may, to some extent, deprive him of the free and calm use of all his faculties." Section 22, art. 1, of our constitution, declares that "in criminal prosecutions the accused shall have the right to appear and defend in person." See also People v. Parrington, 42 Cal. 165; State v. Smith, 11 Oreg. 205.

WILL—LIFE TENANT AND REMAINDER-MAN—RIGHT TO STOCK DIVIDENDS.—In the recent case of McLarth v. Hunt, 48 N. E. Rep. 548, the New York Court of Appeals hold that as between life tenants and remainder-men, stock dividends based upon accumulated earnings of the company should be treated as income and not as capital. The opinion of O'Brien, J., reviews the authorities on the subject, which are utterly at variance, the courts of England, Massachusetts and the United States Supreme Court holding that stock dividends should be treated as capital and go to the remainder-man. Brander v. Brander, 4 Ves. 800; Irving v. Houston, 4 Pat. App. 521; Paris v. Paris, 10 Ves. 184; *In re* Barton, L. R. 5 Eq. 238; Minot v. Paine, 99 Mass. 101; Daland v. Williams, 101 Mass. 571; Leland v. Hayden, 102 Mass. 542; Heard v. Eldredge, 109 Mass. 258; Rand v. Hubbell, 115 Mass. 461; Davis v. Jackson, 152 Mass. 58; Gibbons v. Mation, 136 U. S. 549. The contrary doctrine as now approved by the New York court has been upheld by the courts of last resort of Pennsylvania, Kentucky, Maryland and Tennessee to the effect that stock dividends are income which should belong to the life tenant. Earb's Appeal, 28 Pa. St. 368; Moss' Appeal, 83 Pa. St. 264; Hite v. Hite, 93 Ky. 257; Thomas v. Gregg, 78 Md. 545; Pritchitt v. Trust Co., 96 Tenn. 472. The New York court calls attention to the fact that the English doctrine had been practically repudiated by Lord Eldon in Paris v. Paris, *supra*, and claims that the decisions in Massachusetts and the United States Supreme Court, following what is known as the English doctrine, were inspired largely by the force of precedent and authority.

THE SUMMARY JURISDICTION OF COURTS OVER ATTORNEYS AT THEIR BAR AND THE POWER TO COMPEL GOOD FAITH TOWARD CLIENTS AND A RESTITUTION OF FUNDS OR PROPERTY CONVERTED OR WRONGFULLY WITHHELD.

The duties of courts and attorneys are so nearly related, so interwoven and closely allied, that from the earlier history of our jurisprudence it has been considered that attorneys were officers of the court and were amenable upon summary rule for either a direct indignity to the court, or by bringing the court or the profession into disrepute by infidelity or unprofessional conduct toward their clients. This summary jurisdiction rests not alone on the delicate relation of confidence and trust between the attorney and client, but upon the broad and well known principle that the court must not only be kept pure in fact, but that they must enjoy the very highest respect and confidence of the people; and that all courts possess the

inherent power to require of their officers and attaches such deportment as will maintain this confidence and respect. It follows as a mere corollary that there must be ample power and ready means to enforce these principles against such as are so lacking in moral character or sense of propriety as to make force or discipline necessary. This common-law doctrine was expressly recognized by the statutes of Westminster so early as 1 & 4, Henry IV, ch. 18, and is now regulated by statutes in a number of the States of our national Union. These statutes, however, only moulded into legislative expression the unwritten law which existed unquestioned for generations anterior to the earliest of them. In some, and perhaps most of the States, the statutes have modified the practice, sometimes limiting and sometimes extending the arbitrary power of the court and defining the forms of procedure, or dispensing with formal pleadings, etc., as required by the common law courts. The principles, however, remain unaltered and unaffected by the statutes.[1] In a recent excellent work, it is said: "The summary jurisdiction of courts over attorneys is sufficiently accounted for by the necessary and inherent control vested in them over the conduct of their officers. * * * The ground of the interference is the dignity of the court offended in the conduct of its officer, and its object to punish summarily his misconduct, * * * and to reinstate the injured party in his rights. * * * The jurisdiction exists whenever the employment is so connected with their professional character as to afford the presumption that this formed the ground of the employment."[2] Justice Bradley, of the United States Supreme Court, says: "It is laid down in all the books in which the subject is treated that the court has power to exercise a summary jurisdiction over its attorneys, to compel them to act honestly toward their clients, and to punish them by fine and imprisonment for misconduct and contempts."[3] Justice Nelson, of the same high tribunal, declares: "We do not doubt the power of the court to punish attorneys as officers of the same for misbehavior in the practice of the profession. This power has been recognized and enforced ever since the organization of the courts, and the admission of attorneys to practice therein. If guilty of fraud against their clients, * * * in fine, for the commission of any other act of official or personal dishonesty and oppression, they become subject to the summary jurisdiction of the court."[4] That an attorney has always been considered as an officer of the court, is so universally recognized as to render extended citations of authorities on this point superfluous.[5]

All Courts of General Jurisdiction Have the Power.—Any court of general jurisdiction which has not been deprived of its natural and inherent power as a court over attorneys as officers of its court, has power to issue the rule. In other words, if the statute has not expressly deprived a court of general jurisdiction of its inherent summary jurisdiction over attorneys, then the summary power cannot be questioned; for, as is said by Justice Bradley, and generally recognized by the courts, "It is laid down in all the books in which the subject is treated, that the court has power to exercise summary jurisdiction over its attorneys, and to compel them to act honestly toward their clients."[6] This, of course, does not apply to courts of inferior and limited statutory jurisdiction, like justices of the peace, police, magistrates, etc.

The Rule Applied to Compelling Restitution is Much Less Serious in its Consequences than Disbarment.[7]—It is true that the greater

[1] *In re* H, an attorney, 87 N. Y. 521; Cotton v. Ashley, 11 O. C. C. 47. The Kentucky statutes as set out in Wilson v. Popham, 91 Ky. 327, 15 S. W. Rep. 859, seems to regulate the procedure. The Ohio statute is also broad enough in its terms to cover the procedure, but is held in Cotton v. Ashley, *supra*, to be merely cumulative of the common law powers and remedies. The restrictive statute of North Carolina, as gathered from two reported cases, seems to limit the power of the courts in disbarment cases rather than in the general summary jurisdiction. Kane v. Haywood, 66 N. C. 1, and *Ex parte* Schenck, 65 N. Car. 353. However, it is beyond the purpose of this article to go into the statutes of the various States, as recourse will necessarily be had to the statute in each State where the case arises, and this paper only aims to state the sound general principles.

[2] 1 Am. & Eng. Ency. 944-5; Weeks on Attorneys, sec. 80.

[3] *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. Rep. 569.

[4] *Ex parte* Bradley, 74 U. S. 214.

[5] 2 Gr. Ev. sec. 147; *Ex parte* Garland, 71 U. S. (4 Wall.) 370; *Ex parte* Robinson, 86 U. S. (19 Wall.) 208.

[6] *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. Rep. 569; State *ex rel.* v. Harber, 129 Mo. 271, 31 S. W. Rep. 889. And the right of the legislature to take away the summary jurisdiction, has been questioned by courts of high standing as trenching upon inherent powers of the court, but it is believed the legislature may constitutionally limit and regulate it.

[7] For a full discussion of the Summary Jurisdiction

number of cases in which this summary jurisdiction has been exercised, was in proceedings for disbarment of the attorney, and to cause his name to be stricken from the rolls of the court. Vastly more serious in its consequences to the party affected, is such a proceeding, than one where the jurisdiction is invoked to compel restitution of money, or specific property. To disbar an attorney, not only immediately affects his means of support and the support of those dependent upon him, but it inflicts upon him a stigma and public disgrace, which, in its effect upon the public mind, can be little less than a conviction of crime. As will be seen further on, however, authority is not wanting for the direct application of the power to compelling restitution.

The Right to Other Modes of Procedure Does not Affect the Summary Jurisdiction.—It has sometimes been suggested in behalf of the respondent that the jurisdiction should not be maintained, for the reason that the petitioner has a remedy in the ordinary modes of civil procedure, and that the claim should be referred to an ordinary common law court, like any other claim. Wrongdoers have always been ready and prolific with suggestions of some other mode of procedure for their punishment or compelling them to make restitution, when the mode adopted as best suited to the ends of justice do not suit their dilatory purpose and evasive plans. The courts, however, have not always felt bound to consult the convenience and preference of delinquents in this respect, and with the proper view of the subject, the court will not refuse to take jurisdiction in any case simply for the reason that the complainant may go into any ordinary court of justice and bring a civil suit against the respondent, and thereby so ratify his wrongful act as to give his liability the semblance of an ordinary debt and credit transaction, and allow him to resort to all the means of delay of which he can readily avail himself in such a proceeding. The very object of the summary jurisdiction is to compel ready reparation for wrongs done, and prompt restitution of that which is withheld from the client. In one case where the wronged party first took judgment on his claim, and then invoked the summary jurisdiction to compel payment of the judgment, he was met with the objection that by bringing the civil suit he had treated the matter as an ordinary debt, and was not, therefore, entitled to a summary rule to enforce its collection, and, unsound as was the contention, the court seems to have been misled into holding with the respondent on that point.[8] Sometimes the money wrongfully appropriated, or a part of it, was collected on the process of some other court than that in which the rule is sought; sometimes on cases in several different courts, or, may be, by voluntary payment without suit at all. Many ingenious attempts have been made by wrongdoers thus overtaken to avoid the wholesome summary power of the court. As against answering summarily for misappropriations for collections not by suit, it was attempted to show that summary jurisdiction did not lie in such matters, and there was at one time judicial authority for such contention, but, as will be seen further on, a broader and better rule, more in consonance with the very object and reason of the general doctrine, has been established by more and better considered cases. It has also been contended that where the money has been collected on the process of another court, or different courts, that resort must be had to the very court from which the process issued. If any case ever recognized this fallacy, it is now entirely overthrown. The sophistry of this contention is manifest if we keep in view the purpose of the summary jurisdiction, and the almost boundless sweep of its power. Its purpose is to keep the court and its officers pure, and to compel good faith from attorney to client. Besides, the law does not favor a multiplicity of actions, where a legal remedy can be had in one action. An attorney is amenable to summary rule at the bar of any court of general jurisdiction in which he practices, or any court which has power to license attorneys; and the inquiry will extend to any unprofes-

of Courts in the Disbarment of Attorneys, see Mr. Henry Z. Johnson's late article on that subject, 43 Cent. L. J. 401, and the able and elaborate note to the celebrated Philbrook Case (105 Cal. 471), 45 Am. St. Rep. 59, 71-86. These two able papers almost exhaust the subject.

[8] Windsor v. Brown, 15 R. I. 182, 9 Atl. Rep. 135. The opinion in this case seems to proceed upon the theory that "as remedies by suit and by summary process are concurrent, the election of one is a waiver of the other." It is more plausible than logical. For the contrary and better doctrine, see *In re* Tover, 78 Cal. 307, 20 Pac. Rep. 674.

sional conduct properly charged, without regard to whether it was in relation to duties in that court or some other, or not in a court at all, if within the scope of his professional duties as an attorney. It will, of course, where practicable, be the better practice to take the rule at the bar of a court where respondent resides; but this being done, or in cases where, for some good reason, it cannot be done there with sufficient promptness, and therefore, from necessity must be at some other than his home bar, the inquiry may extend to all misappropriations properly charged in the petition or motion.[9]

To What the Summary Jurisdiction Extends.—By the solemn and considerate adjudication of courts of high standing, and in many cases the courts of last resort in that jurisdiction, it has been determined that this summary jurisdiction extends not merely to cases for disbarment, or striking the name of the respondent from the roll of attorneys, but also to compel the attorney: 1. To perform his undertakings.[10] 2. To observe the strictest good faith in his relations with his clients.[11] 3. To deliver up documents.[12] 4. When necessary, to vindicate the honor and dignity of the court and the profession, although the undertaking be not strictly enforceable at law.[13] 5. To pay over money, or make restitution of property withheld.[14]

Weight of Authority—No Serious Conflicts.—On this subject, as on nearly every subject which has come often before the courts, there is not perfect unanimity in the reported cases as to one court issuing a rule for misconduct under another jurisdiction, or for any proceedings not had in the court where the rule is sought. Some cases may be found holding or intimating that the summary rule must issue on application in the same court where the original action or proceeding was had; some possibly going so far as to hold no jurisdiction unless the delinquency relates to a suit; but the great weight of authority is clearly in support of the broad general exercise of the jurisdiction as stated above, and the cases relied on are in harmony with the general rule and reason of the doctrine, while the contrary cases lose sight of the fundamental rule and reason. This point is well stated in a very recent and well considered case by the Supreme Court of Wisconsin, in which it is said: "As to the fourth finding, it is said that the accused did not receive the money in the course of his business as an attorney but merely as bailee, and hence that his wrongful conversion of it does not subject him to disbarment or suspension. Cases are cited which seem to sustain such a contention, but we decline to follow them. The better rule seems to be that the misconduct requisite for such suspension is not limited to acts committed strictly in a professional character, but extends to all such misconduct as would have prevented an admission to the bar."[15]

Some of the Cases Examined.—Anderson, Guardian, v. Bosworth, in the Supreme Court of Rhode Island, was a petition for a summary rule against an attorney to pay over certain money he had received from a third party in carrying out a settlement agreed upon between the parties, the money having been paid to the use of the guardian. After stating the facts, Durfee, C. J., said: "Two questions are raised; the first is whether the respondent is entitled to retain his fees

[9] People v. Goodrich, 79 Ill. 148; *In re* O, 73 Wis. 602, 42 N. W. Rep. 221. See also Bar v. Taylor, 60 Conn. 12, 22 Atl. Rep. 44; *In re* Wescott, 34 Atl. Rep. 505.

[10] Weeks on Attorneys, sec. 78; Burrell v. Jones, 3 Barn. & A. 47; Iverson v. Covington, 1 Barn. & C. 160.

[11] Weeks on Attys. sec. 77; *In re* Aitken, 4 Barn. & A. 47; *In re* O, 73 Wis. 602, 42 N. W. Rep. 221.

[12] Weeks on Attys., secs. 92-3; *In re* Williams, 4 L. T. (N. S.) 103; Duncan v. Richmond, 7 Taunt. 391; Steven v. Hill, 10 M. & W. 28, 32.

[13] *In re* Hillard, 9 Jur. 664; Evans v. Duncombe, 1 Cromp. & J. 373; Weeks on Attys., sec. 78.

[14] State *ex rel.* Berry v. Morgan, 80 Iowa, 413, 45 N. W. Rep. 1070; De Wolf v.———,2 Chit. 68; *Ex parte* Staats, 4 Cowen, 76; *Ex rel.* Bacon v. Wilson, 5 Johns. 367; People v. Smith, 3 Caines, 221; *In re* Aitken, 4 Barn. & A. 47; *In re* Knight, 1 Bing. 91; Cotton v. Ashley, 11 O. C. C. 47, Feb., 1896; Wilson v. Popham, 91 Ky. 327, 15 S. W. Rep. 859; Slemmer v. Wright, 54 Iowa, 164, 6 N. W. Rep. 181; McMath v. Mann Bros. (Ky.), 15 S. W. Rep. 879; Anderson v. Bosworth, 15 R. I. 443, 8 Atl. Rep. 339.

[15] *In re* O, 73 Wis. 602, 42 N. W. Rep. 221, citing *In re* Hill, 3 Q. B. 543, *In re* Blake, 3 E. & El. 34. This Wisconsin case is replete with sound doctrine on various points of our general subject. The opinion of Justice Cassody, able and discriminating, carefully keeping in view the safe-guards which the law throws around the attorney to protect him from malicious assaults on his character, while at the same time protecting and maintaining the standard of morality required for admission to and continuance in professional duties. The observations of Judge Bundy, who tried the case below, in his conclusions upon the facts, have the sound judicial ring, and are worthy of careful reading.

out of the $100, and if he is not, the second is, whether the petitioner presents a case for the exercise of the summary jurisdiction of the court." After discussing and deciding the first question, the court passes to the second, and says: "The summary jurisdiction evidently originates in the disciplinary power which the court has over attorneys as officers of the court. The opinion seems to have been prevalent at one time that the jurisdiction extended only to attorneys employed as such in suits depending in court, to hold them to their duty in such suits, but a more liberal view has obtained, and it is now well settled that the jurisdiction extends to any matter in which an attorney has been employed by reason of his professional character."[16] In The People *ex rel.* v. Goodrich, 79 Ill. 148, the information was filed by the relators in the supreme court of the State, complaining of the respondent for certain unprofessional conduct in his practice relating to business in certain courts other than the one in which the information was filed. Objection to the jurisdiction of the court was made, and in passing upon that point the Supreme Court of Illinois said: "The objections made by the defendant of want of jurisdiction in this court to entertain the case, the constitutionality of the law giving the jurisdiction, the right of a trial by a jury on information, are entitled to no weight. This court having power by express law to grant a license to practice law has an inherent right to see that the license is not abused or perverted to a use not contemplated in the grant. In granting the license, it was on the implied understanding that the party receiving it should, at all times, demean himself in a proper manner, and if not reflecting honor upon the court appointing him, by his professional conduct, he would at least abstain from such practices as could not fail to bring discredit upon himself and the court." In the matter of H, an attorney, 87 N. Y. 521, the application was for summary rule to compel the respondent to deliver over an insurance policy which had been intrusted to him as an attorney in fact, and not as an attorney at law. In the appellate court, the case was decided for the accused upon its merits, upon the ground that the policy was withheld properly, but the opinion recognizes the general doctrine contended for here. The court says: "It does not follow, however, as the appellant contends, that the remedy pursued in this case was without legal authority. It rests upon the relation of the attorney to the court as its officer and the general control always exercised, founded on that relation. The code has not taken it away, and purports in the section cited only to regulate and direct in its exercise in the class of cases specifically mentioned. The general authority remains, but it is a power which has reasonable limitations, and has usually been and should always be exercised with great prudence and caution and a sedulous regard for the rights of the client on the one hand, and the attorney on the other." In *Re* Executor of Aitken, 4 Barnw. & A. 47, a rule had been obtained by the executor against the respondent Blaymyer, attorney, to show cause why he should not account for business done by him for the testator Aitken, and to pay over the balance in his hands to the executor. He tried to avoid the rule by showing that he had not been employed to prosecute or defend in any cause or suit in the court where the rule was laid, or any other court. Abbott, C. J., in delivering the opin- of the court, said: "The question in this case is whether this court will compel an attorney to do that which in justice he ought to do. Now the rule which the court is to be governed in exercising this summary jurisdiction over its officers, seems to be this: Where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by his client, there the court will exercise this jurisdiction."[17] In a recent case, the Supreme Court of California entered a rule against respondent suspending him from practice until he should pay a judgment for money collected by him as an attorney.[18] In harmony with the doctrine announced in the Goodrich Case,[19] it has very

[16] Anderson, Guardian, v. Bosworth, 15 R. I. 443, 8 Atl. Rep. 339.

[17] See Com. Law Rep. vol. 6, p. 344.

[18] *In re* Tover, 78 Cal. 307, 20 Pac. Rep. 674.

[19] People v. Goodrich, 79 Ill. 148.

recently been held in the well considered Wisconsin case already noticed, that the fact that the misconduct occurred before another jurisdiction is no objection to the proceedings to disbar.[20] *Ex parte* Staats[21] was on motion for a rule to pay over money collected by voluntary payment on a bond. The attorney questioned the jurisdiction on the ground that the money was not paid in connection with any matter in court, and also made affidavit that he was poor and unable to pay the money, and offered all his property, and all the restitution it seemed he was able to make. In rendering its opinion on the case, the court tersely says: "The motion must be granted. It is plain that this bond was left with Mr. E, in his character as an attorney, though no specific directions were given to bring suit. It turned out that there was no need to bring suit. The money was paid in; and the relator is entitled to our aid in obtaining it in the same manner as if collected by suit." In one of the Iowa cases, cited above, the respondent questioned the jurisdiction of the court on the ground that there was a dispute about the relation of attorney and client existing, and also on an attempted showing that he claimed a balance due him as fees, etc., and hence it assumed the form of a civil suit; but the court found no trouble in disposing of these objections, and sustained the jurisdiction, and enforced the summary rule.[22] In another case, the Supreme Court of Iowa sustained and heartily indorsed a judgment of suspension with the right to respondent to apply for reinstatement within a given time, upon a payment by him of the money he had appropriated. The court says: "If an attorney withholds the money of his client, the court will afford relief in a summary way without driving the client to an action."[23] These are but a few examples of the many cases which this paper has attempted to epitomize.

Conclusion.—From the authorities cited in the foregoing, the following conclusions are deduced: 1. General original jurisdiction in civil actions is not necessary to confer jurisdiction for summary proceedings against attorneys. 2. It is not essential to the summary jurisdiction that the misconduct or defalcation should have grown out of a cause pending in the court where the rule is sought. 3. It is not necessary that the misconduct complained of should be connected with any action or proceeding in any court. 4. Any court having jurisdiction to license attorneys to practice or to hear proceedings for his disbarment, has jurisdiction to issue and enforce the summary rule for restitution. It is not within the purpose of this article to notice the cases in which jurisdiction has been denied, or the petition finally failed for such manifest want of merit in the case as disgusted the court. An example of this is found in a Pennsylvania case.[24]

Chicago, Ill. FRANK W. BABCOCK.

[20] *In re* O, 73 Wis. 602, 42 N. W. Rep. 221.
[21] 4 Cow. (N. Y.) 76.
[22] State v. Morgan, 80 Iowa, 413, 45 N. W. Rep. 1070.
[23] Slemmer v. Wright, 54 Iowa, 164, 6 N. W. Rep. 181.
[24] *In re* Kennedy, 120 Pa. St. 497, 14 Atl. Rep. 397.

CONTRACTS — PERFORMANCE — DESTRUCTION OF SUBJECT-MATTER.

NICAL v. FITCH.

Supreme Court of Michigan, November 17, 1897.

1. Where the respective owners of three steamboats agreed to use them as a transportation line, and hired an agent to obtain freight for the line, the owners of each boat agreeing to pay an equal portion of his salary, and the agent performed his part of the agreement, the owners of one of the boats cannot refuse to pay their stipulated share of his salary because of their boat's destruction.

2. One having agreed to obtain freight for certain parties to transport fully performs his contract when he so obtains the freight, and is not obliged to bring his action for a breach of the contract, instead of upon the common counts, simply because the parties failed to transport the goods.

Hooker, J.: In the spring of 1894, defendants, being the owners of a vessel named the Ohio, Capt. Galvin, representing the steamer Saginaw Valley, and Capt. Scott, representing the Ford, made arrangements to run these boats on different days, in connection with the Vermont Central Railway, as one line of boats, under the name of Ogdensburg Transportation Line, though they were owned and run by their respective owners. A contract was then made for the mutual benefit of the owners of the vessels, with Capt. Eber B. Ward, to act as agent in securing freight for these boats during the season, for which it was agreed that each should pay him one-third of his salary (which was $1,000), and of certain incidental expenses arranged for. Each owner was to have the proceeds from the freight carried by his boat. It is admitted that Capt. Ward performed the services contemplated during the season, and the

owners of the other two boats paid their two-thirds of his salary. The defendants paid $107, and refused to pay more, upon the ground that their vessel, the Ohio, was lost during the season, and that the $107 paid was the proportionate share of his contract that Ward had earned at the time the vessel was lost. Plaintiff is the assignee of Ward's executor, and he was allowed to recover upon a declaration containing the common counts, on the theory of a contract fully performed by Ward. Upon the other hand, it is contended that Ward did not perform his contract; that such was made impossible by the destruction of the Ohio; and that, therefore, his right of action, if he had any, was for a breach of the original contract by the defendants. The meritorious question involved is whether the loss of the Ohio terminated the contract. From a refusal to direct a verdict in their favor, the defendants have appealed.

It is obvious that the case is not one where the performance of the contract was a physical impossibility, as where one agreed to sell a horse, and the horse died, or to make cider from certain apples, which were immediately destroyed by fire. It is rather the case of one refusing to receive goods bargained for, because it had become impossible, through accident, for him to make a contemplated use of the goods. It is clear that such cases are not within the rule that one is released from a contract when contingencies must be provided for in the contract if one would avoid the consequences. See Beebe v. Johnson, 19 Wend. 500; Dermott v. Jones, 2 Wall. 1; The B. L. Harriman v. Emerick, 9 Wall. 175; Blight v. Page, 3 Bos. & P. 295, note; Jones v. U. S., 96 U. S. 24. This doctrine is well supported by authorities cited in the opinions of the federal cases above referred to. See, also, Ford v. Cotesworth, L. R. 4 Q. B. 132. A distinction is sought to be drawn between the cases of the class mentioned and those where the contract may be said to contemplate the continued existence of a particular person or thing which is the subject of the contract. This rule has been applied to the case of the rental of a music hall destroyed by fire, an apprentice who became ill, and could not render personal service, and a woman whose illness prevented her from performing as a pianist; but it was held not applicable to a case where one contracted to manufacture a certain iron work, and the mill was destroyed by fire. It was said: "There was no physical or natural impossibility inherited in the nature of the thing to be performed, upon which a condition that the mill shall continue can be predicated. * * * True, the contract specifies the place, but it necessarily has no importance except as designating a place of delivery." Booth v. Mill Co., 60 N. Y. 490. In Taylor v. Caldwell, 113 Eng. Com. Law, 824, A agreed with B to give him the use of a music hall on specified days, for the purpose of holding concerts. The hall was burned, and both parties were held discharged. Blackburn, J., said: "The principle seems to us to be that, in contracts in which performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance." And it is said in Dexter v. Norton, 47 N. Y. 62: "The reason given for the rule is because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular thing or person." That there are cases where such an inference is reasonable is obvious, as in cases of contract of marriage, and perhaps the case of the music hall; but it ought not to be said to be apparent, unless the character of the contract is such as to clearly disclose such intention, and there is danger that courts, in their desire to relieve contracting parties in hard cases, may extend it to contracts where the implication is not apparent. The Supreme Court of Missouri held it not applicable where an insurance company claimed that a contract by which an agent was employed for five years was terminated by its insolvency (Lewis v. Insurance Co., 61 Mo. 538); and this court held a school district liable for the wages of a teacher, though it was found necessary to close the school, by reason of the prevalence of smallpox. See Dewey v. School Dist., 43 Mich. 480, 5 N. W. Rep. 646, 38 Am. St. Rep. 208, and note. See, also, 2 Smith, Lead. Cas. 36.

In the case before us the subject-matter of the contract was the procurement of freight to be transported. Ward undertook to give his time to this, and did so. On the part of the defendants a promise to pay was made. Ward performed his promise, and the defendants decline, not because they cannot pay, which is certainly a physical possibility, but because it has become inconvenient for them to transport the goods owing to the loss of their vessel. The parties had agreed that Ward was to secure all the freight for transportation by this line that he could obtain, for which he was to receive $1,000, one-third of which sum was to be paid by the defendants. They were under no obligation to Ward to transport any of it in the Ohio, or at all, for that matter. The share the Ohio would transport would depend upon circumstances not within Ward's control. Had the defendants immediately substituted another boat for the Ohio, Ward would not have been discharged from the obligation of the contract, which would have been susceptible of performance. The case is not dissimilar from one whereby the captain of the Ohio should have agreed with the owner of goods, without qualification, to transport them, both parties expecting them to be transported in the Ohio. The loss of the vessel would not relieve the owner from the contract, as the freight could as well be transported in another vessel. If the contract bound him to transport the goods in the Ohio, the rule would be different. But it did not. In fact, it did not bind him to transport them at all. Ward, as his agent, was to secure

the freight, but there is nothing in the record that shows that Ward had a right to insist that it be transported by defendants. His contract was performed when he secured the freight, and defendants had no option but to pay. Ward having fully performed his contract, a declaration upon the common counts was proper. Upon the undisputed testimony, the plaintiff was entitled to recover, and the court might properly have directed a verdict. It therefore becomes unnecessary to consider other questions. The judgment is affirmed. The other justices concurred.

NOTE.—As the principal case shows there is a clear distinction between excuse for the non-performance of a contract, performance of which may be difficult or even impossible on account of the happening of some unforseen event against which the promisor could have protected himself by stipulation, and one where from its nature it is evident that the parties contracted on the basis of the continued existence of the person or thing to which it relates. In reference to the first class the common law practically says to parties who are entering into contracts, "Don't promise what you can't perform." A man is not obliged to undertake to do a dangerous or a burdensome or an unreasonable thing, but if he does so he must carry out his agreement. Lawson on Contracts, § 420, citing Vyse v. Wakefield, 6 M. & W. 456; Hall v. Wright, El. B. & E. 765. So if he wishes to protect himself from the thing which he agrees to do turning out to be difficult or dangerous or unreasonable to do, he has full opportunity to so provide in his contract, and if he promises unconditionally he will be bound unconditionally. Dewey v. Alpena School Dist., 43 Mich. 480; Superintendent v. Bennett, 27 N. J. L. 513; McDonald v. Gardner, 56 Wis. 35; Dermott v. Jones, 2 Wall. 1; Jones v. Scott, 59 Pa. St. 178. Thus a person who sells goods agreeing to deliver them at a certain time cannot plead that, contrary to his expectations, he could not get the goods when or at the price he intended (Phillips v. Taylor, 49 N. Y. Sup. Ct. 318), nor that on account of disturbances in the country it would be dangerous to try to deliver them. Elsey v. Stamps, 10 Lea, 709. So one who agrees to do certain work cannot set up that on account of matters connected with it which he did not expect it has become difficult or will be impossible to carry it on. Devlin v. New York, 4 Duer, 337. So where a school teacher was engaged for a certain term, and the directors before the end of the term closed the school on account of small pox in the neighborhood, it was held that the fact that it was dangerous to continue the school was no answer to the teacher's suit for the remainder of his salary. Dewey v. School District, 43 Mich. 480. And where the plaintiff entered into an agreement to furnish a certain number of horses to the government, and before the time the horses were deliverable the bureau of cavalry, as it had a right to do, adopted new regulations in regard to the inspection and acceptance of horses, which the plaintiff claimed made it impossible for him to obtain horses and he abandoned his contract, this was held no justification. *In re* Smoot, 15 Wall. 36. Leaving out of consideration the questions arising in cases where the performance is rendered impossible through the act of God, it may be said by way of summary of the propositions heretofore stated, that if the promisor makes the performance of his promise conditional upon its continued possibility the promisee takes the risk, and in the event of performance becoming impossible the promisee must bear the loss; but if the promisor makes his promise unconditional, he takes the risk of being held liable even though performance should become impossible by circumstances beyond his control. Lawson on Contracts, sec. 422, citing a long list of cases. Thus in School District v. Dauchy, 25 Conn. 530, defendant agreed to build and complete a school house for plaintiff. When nearly completed the building was struck by lightning and destroyed. The court held that the destruction of the building did not excuse defendant's non-performance of the contract. So where one had agreed to transport goods from New York to Independence, Mo., within twenty-six days, and failed to accomplish it in that time, it was held that the fact that the public canal on which the goods were intended to be transported a part of the distance was rendered impassable by an unusual freshet, and that this occasioned the detention, was not a legal excuse therefor. Harmony v. Bingham, 12 N. Y. 99. To the general rule, however, there are two exceptions, first, where the performance is rendered impossible by the act of the law. Wade v. Mason, 12 Gray, 335; Livingston v. Tompkins, 4 Johns. Ch. 416; Jones v. Judd, 4 N. Y. 411; Baker v. Johnson, 42 N. Y. 126; Buffalo, etc. Railroad Co. v. Railroad Co., 111 N. Y. 132. Second, where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing to which it relates. Dexter v. Norton, 47 N. Y. 62; Lord v. Wheeler, 1 Gray, 282; Wells v. Calnan, 107 Mass. 514; Powell v. Railroad Co., 12 Oreg. 488; Ward v. Vance, 93 Pa. St. 499; Walker v. Tucker, 70 Ill. 527; Gould v. Minch, 70 Me. 288; Thompson v. Gould, 20 Pick. 134; Livingston v. Graves, 32 Mo. 479; Taylor v. Caldwell, 3 B. & S. 826.

CORRESPONDENCE.

LIABILITY OF WAREHOUSEMEN.

To the Editor of the Central Law Journal:

A criticism of the opinion of the Supreme Court of the State of Oregon, in the case of State v. Stockman, 46 Pac. Rep. 851, by Mr. D. R. N. Blackburn, in your issue of October 15th last, deserves attention. The criticism itself is preceded by a learned discussion of the criminal liability of warehousemen, and with that part of the paper I have no concern, though, to say truth, in parts of it it seems to partake more of the nature of a stump speech to the "neighboring farmers" than of an elucidation of the law of the subject. The opinion in question would not need a defense if Mr. Blackburn had printed, along with his criticism, the vital facts of the case, and the controlling parts of the opinion itself. Mr. Blackburn's contention that the transaction in question was a warehouse transaction, and the defendant was guilty of violating the terms of the warehouse act, is based upon the construction of the receipt for the wheat stored, which is as follows: "Red Crown Mills. No. 1078. Albany, Oreg., Sept. 18th, 1894. Received of E. D. Barrett, by self, 2,198-15-60 bushels, No. 1 merchantable wheat, subject to sacks and storage, eight cents per bushel, if withdrawn from mill. 2,198-15-60 bushels. (Signed) Red Crown Roller Mills. Lyons." Mr. Blackburn says this contract constituted the defendant a warehouseman and the bailee of the wheat. He says, "Under this receipt, who had the sole right to determine

whether or not this wheat should be withdrawn from the mill? Certainly not the company. Then only the storer had this right. In other words, this receipt gave the bailor the right to elect whether or not he would sell the wheat to the company, or pay storage and sackage and withdraw it from the mill. Until he actually exercised this right, the company, under the statute and under its contract, had no interest in the wheat, except that interest which a bailee for hire always has in property in his possession." Of course, if the defendant is to be tried solely upon the facts appearing in the receipt, and if Mr. Blackburn's construction of the writing is a correct one, then he would be right. But neither of these propositions is true. This receipt does not state the terms of the bailment. Sackage and storage were to be charged, "if withdrawn from the mill." But what if not withdrawn from the mill? What was the part of this contract that was omitted from this receipt? The court answers that in this language: "Upon its face the receipt issued to Barrett affords no solution of either of these questions (whether the wheat in question was in fact placed in a warehouse, and whether it was placed there on storage), for it is silent as to whether the building was, in fact, a warehouse, and as to whether the wheat was received on storage or for some other purpose, and, therefore, resort could be had to parol evidence to ascertain the true character of the business in which the mill company was engaged, as well as the terms on which the wheat was received," citing Lyon v. Lenon, 106 Ind. 567, 7 N. E. Rep. 311. The court further said: "Parol evidence was given and offered tending to show, and from which the jury could have found, that the mill company did not receive grain for storage or safe keeping, but that according to its usual course of business, known to its customers, and particularly to Barrett, all wheat received by it was mixed with, and became a part of, the consumable stock of the mill, and was manufactured into flour and other mill products, and sold and disposed of by the mill company in the usual course of business, and that it satisfied its obligation to its depositors by paying them the market price when demanded, or by returning a like quantity and quality of other wheat. In the former case no storage was charged or paid, but in the latter the charge of eight cents a bushel was made for sacks and storage, and this accounts for the provision in the receipt to Barrett concerning the payment of storage, if the wheat should be withdrawn from the mill." The authorities show that such a transaction is a sale and not a bailment. Lyon v. Lenon, 106 Ind. 567; McCabe v. McKinstry, 5 Dill. 509; Fed. Cas. No. 8667; Andrews v. Richmond, 34 Hun, 20; Johnston v. Brown, 37 Iowa, 200; Nelson v. Brown, 44 Iowa, 455. Under the terms of such a contract the mill company had a right to manufacture the wheat into flour and sell it. That was the business it conducted. It did not keep a warehouse for storing wheat, but operated a mill to make flour. Everybody knew this. It had been notorious for years, and in this case it was proven that there had never been a single instance where storage had been received by the mill company for wheat deposited there. It always bought the wheat and paid for it. And the court, in its opinion, says: "The depositee cannot be convicted of a crime for doing that which he is permitted to do by the very terms of his contract." And the court further says: "The evil sought to be remedied by this legislation, and the remedy sought to be applied, alike show it never was within the legislative mind that it should apply to the case where a bailee has the right, under the contract, expressed or implied, to sell or use the goods committed to his care. In such case, in the very nature of things, there can be no storage or bailment, but the transaction is in essence a sale of the commodity and an extension of personal credit to the bailee." These extracts from the opinion sufficiently vindicate it from the criticisms of Mr. Blackburn. It announces no novel proposition, but simply makes a well-settled distinction between a bailment and a conditional sale.

MARTIN L. PIPES.

Portland, Oregon.

SUITS BY POOR PERSONS.

To the Editor of the Central Law Journal:

In your issue of December 3d, of the CENTRAL LAW JOURNAL, No. 23, Vol. 45, at page 441, I observe your excerpt from the ruling of Judge Grosscup, in the United States Circuit Court in Chicago, to the effect that when "poor persons" claim the benefit of being such to avoid giving security for costs, that counsel for such person, filing an affidavit to that effect, must enter into a stipulation that the recovery shall be paid into court, the costs to be first paid therefrom, then the attorney's fee, as determined by the court, and the balance to go to the plaintiff. I fail to see wherein this affords any protection to the defendant in the matter of costs. The rule was made upon an application by a defendant to require the plaintiff to give bond for costs. If the plaintiff recover, costs follow the judgment in actions at law and would be collected, together with the judgment, from the defendant. The only parties benefited might possibly be the officials, but their costs are small, compared to the expenses and disbursements of a defendant in such litigation, and as the learned judge says that four out of five of such cases brought are without merit, it will be seen where great injustice is done to four out of five defendants. In other words, a defendant does not need protection when a recovery is had against him; it is only when the defendant recovers that security for costs will be of any use, and in such cases there would be no fund to pay into court by the plaintiff, hence the defendant is still remediless. In these days of contingent fees, and the consequent multiplicity of litigation by indigent persons against responsible people, it is meet that some restraint should be placed upon such persons, or at least some protection afforded to defendants. I suggest, for the consideration of my brethren, that where an indigent person has, or fancies he has, a cause of action, and wishes to bring suit, that he be required (in order to avoid giving security for costs), to apply to the court for leave to sue, making his indigency appear; that if he satisfies the judge that he has a cause of action, that leave to sue be granted, and that in case of his failure to recover, costs be taxed against the county. This would equalize the burden and would afford some measure of protection. If, as Judge Grosscup holds "such a plaintiff is a ward of the court and should be protected if there be merit in the case," then, as costs are not recoverable against the ward, they should be against the municipality which affords the machinery for such ward to cause expense to others. An act embodying these suggestions was introduced into the legislature of Wisconsin in 1893, at my suggestion, but was defeated in the committee room. I think the subject is worthy of agitation, and I know meets the approval of many lawyers, manufacturers and those engaged in industrial pursuits. I see no reason why it should not be favored by the laboring classes as well. Couple with this, the right

of the court to fix the attorney's fee to be determined in size by the judgment recovered, and a much needed safeguard will be secured.

E. C. E.

JETSAM AND FLOTSAM.

SIGNATURE TO NOTE INDUCED BY FRAUD.

The city court of New York, in general term, has decided that a party who is induced to sign a promissory note by fraud or deception practiced upon him by the payee, and signs it, thinking that it is a different kind of contract, is not liable thereon to an innocent indorsee for value before maturity, unless the maker was guilty of laches or carelessness in omitting to ascertain the true nature of the instrument. Hutkoff v. Moje, 46 N. Y. Supl. 905 (July 2, 1897). See 36 Am. L. Reg. & Rev. (N. S.) 724. This is not a new rule in New York. Bank v. Veneman, 43 Hun, 241 (1887). But one who has all the means of information at hand, and chooses to rely upon the representations of another as to the nature of the paper which the former is signing, is estopped by his negligence from setting up the fraud in obtaining the note as against a *bona fide* purchaser for value before maturity. Chapman v. Rose, 56 N. Y. 137 (1874).

There is rather a hopeless conflict of authorities regarding the liability of persons whose names appear on negotiable instruments, through fraud, when the paper is in the hands of *bona fide* holders. An attempt at reconciliation would be useless. There are many cases where persons have been induced by fraudulent representations to sign negotiable paper, intending and believing that they were signing some other form of contract. There is authority for the proposition, that in the absence of negligence on the part of such persons, they are not liable, even though the paper come into the hands of a *bona fide* puchaser for value before maturity. Taylor v. Atchison, 54 Ill. 196 (1870); Puffer v. Smith, 57 Ill. 527 (1871); Anderson v. Walter, 34 Mich. 113 (1876); Bank v. Lierman, 5 Neb. 247 (1876); Griffiths v. Kellogg, 39 Wis. 290 (1876); Green v. Wilkie, 66 N. W. Rep. 1046 (Iowa, 1896). And this would seem to be because there was no contract originally, inasmuch as the person so signing had no intention of signing such a paper. Walker v. Ebert, 29 Wis. 194 (1871). But it is necessary for the maker to show freedom from negligence. Bank v. Steffes, 54 Iowa, 214 (1880). However, if the fraud be made possible by the negligence or carelessness of the maker, he is liable to a *bona fide* holder. Garrard v. Haddan, 67 Pa. 82 (1870); Douglass v. Matting, 29 Iowa, 498 (1870). In any case, however, the *bona fide* holder of a negotiable instrument, fraudulent in its inception, can recover from the maker only so much as the former paid for it. Beckhous v. Bank, 22 W. N. C. (Pa.) 53 (1888); Oppenheimer v. F. & M. Bank, 36 S. W. Rep. (Tenn.) 705 (1896).

On the other hand, it has been decided that it is no defense to an action by a *bona fide* holder against the maker of a note that the latter was induced to sign it by fraud. Broadbent v. Huddleson, 2 W. N. C. (Pa.) 293 (1876); Bank v. McCann, 11 *Id.* 480 (1882); Highsmith v. Martin, 24 S. E. Rep. (Ga.) 865 (1896). Nor can such a note be invalidated in the hands of a *bona fide* holder unless actual fraud can be shown on his part. Matthews v. Poythress, 4 Ga. 287 (1848); Worcester Bank v. Dorchester Bank, 10 Cush. (Mass.) 488 (1853); Crosly v. Grant, 36 N. H. 273 (1858); Bank v. Hoge, 7 Bosw. (N. Y. Superior Ct.) 543 (1861); Magee v. Badger, 34 N. Y. 247 (1866); Hamilton v. Vought, 34 N. J. L. 187 (1870); Bank v. Hewitt, 34 Atl. Rep. (N. J.) 988 (1896). But the holder of such a note has the burden of proving his good faith. Hardware Co. v. Bank, 109 Pa. 240 (1885); Hale v. Shamon, 57 Hun (N. Y.), 466 (1890); Jones v. Burden, 56 Mo. App. 199 (1893); Campbell v. Huff, 31 S. W. Rep. (Mo.) 603 (1895); Hodson v. Glass Co., 40 N. E. Rep. (Ill.) 971 (1895); Fawcett v. Powell, 43 Neb. 437 (1895); Thamling v. Duffy, 37 Pac. Rep. (Mont.) 363 (1895).—*American Law Register and Review.*

A LAWYER IN HIS OWN CASE.

If the lawyer who represents himself has, according to the proverb, a fool for a client, the converse is equally true, and the client is every whit as unfortunate in the selection of his counsel. This truth finds illustration in the recent North Dakota case of Root v. Rose, 72 N. W. Rep. 1022. An attorney, who had been punished for contempt and then disbarred for other sufficient cause, conceived the idea of an action for damages. His blood was up, and he was not a person of half-way measures. So he bearded the court and all its satellites, by bringing his action against the judge who convicted, the State's attorney who prosecuted, the clerk who entered up the judgments, and the sheriff who arrested him. But he employed himself as counsel. Fatal mistake! Let the supreme court of the State describe the character of the complaint that he drew.

"The complaint in this cause presents, upon a superficial reading of it, a strange medley of conspiracy, false imprisonment, malicious prosecution, slander, and other unlawful invasions of the plaintiff's rights. Distinct causes of action succeed each other in rapid succession, each making its separate claim for heavy damages for the wrong it essays to charge against the parties to this alleged conspiracy, the defendants in this case. If the sufficiency of the pleading is to be tested by the number and character of the adjectives employed by the pleader, if a marshalling of a formidable array of intense epithets can obscure or change the character of the facts which are spread upon the face of the complaints, or alter the legal rules which apply to such facts, then, indeed, has the plaintiff stated a cause of action entitling him, if sustained by evidence, to the recovery of very heavy damages. A dark and foul conspiracy has been formed and executed by the defendants, having for its object the malicious prosecution of the plaintiff, his unlawful arrest, his incarceration in a noisome prison, the defamation of his character, and the wresting from him of the privilege of following the profession of the law for a livelihood by accomplishing his disbarment. So runs the complaint in its theory. But when we read its admitted facts in the light of legal principles hoary with time, and of universal recognition we can find nowhere within its four corners any charge of an actionable wrong." In other words it was pyrotechnics, but it wasn't pleading!—*Virginia Law Journal.*

HUMORS OF THE LAW.

The Court (sternly): "Make that man remove his hat!"

Miss Flip (indignantly): "I'm no man."

The Court (sotto voce): "Then I'm no judge!"

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCOUNTING — Remedy at Law.—Three contracts, and two supplemental ones, were set out in a bill seeking relief in equity. They extended over a long period of time, and involved many thousands of dollars; there being a great variety of grades of lumber in each contract, each grade having a separate price. Payments were made, under them, extending through a series of years. Great controversy whether insurance was properly paid was involved, also a controversy as to whether lumber was shipped in place of lumber burned, and also a manifest complication of accounts, and great difficulty in the way of adequate relief by action at law: Held that, though the accounts might not be mutual, equity would retain jurisdiction.—BLODGETT V. FOSTER, Mich., 72 N. W. Rep. 1000.

2. ACTION EX DELICTO—Misjoinder.—In a declaration charging willful and malicious injury to a chattel, allegations of bailment, and implied contract to use care and return the chattel in good condition, are recitals by way of inducement only. The action is *ex delicto*, and misjoinder of defendants will not defeat it.—STATE V. OLIVER, N. J., 38 Atl. Rep. 693.

3. ADMINISTRATION—Action against Administratrix.—An administratrix of a solvent estate had in her hands sufficient cash to pay an allowed claim against the estate, but refused to pay it, although more than two years had elapsed since such allowance, and the time fixed by the probate court for allowing claims had expired. Thereupon the probate court made an order permitting the claimant to bring suit against the administratrix and her bondsmen, they having refused to pay the claim on demand: Held, that it was not necessary that the probate court should order the claim paid before the right of action accrued to the claimant to bring such suit.—JOHANSON V. EKLUND, Minn., 72 N. W. Rep. 965.

4. ADVERSE POSSESSION — Attornment.—One who takes possession of land without any claim of right or title may, on the subsequent sale of the land for taxes, by agreement with the purchaser at such sale, hold in subordination to him, so as to render the possession that of the purchaser, without notifying the owner of the record title of such agreement.—HOLTZMAN V. DOUGLASS, U. S. S. C., 18 S. C. Rep. 65.

5. ADVERSE POSSESSION — Payment of Taxes.—In ejectment the defense of adverse possession fails where defendant shows only color of title and possession, and does not show payment of taxes for seven years by or on behalf of the person having color of title and actual possession.—BELL V. NEIDERER, Ill., 48 N. E. Rep. 194.

6. ANIMAL — Property in Dog.—The owner of a dog has such a property in it as will enable him to maintain an action of trover for its recovery in case of its wrongful conversion.—GRAHAM V. SMITH, Ga., 28 S. E. Rep. 225.

7. APPEAL—Law of Case.—The judgment of the appellate court becomes the "law of the case," and the mere amendment of the pleadings, upon reversal, by increasing the demand so as to bring the case within the jurisdiction of the supreme court, does not change the rule.—JAMES V. LAKE ERIE & W. RY. CO., Ind., 48 N. E. Rep. 222.

8. APPEAL—Writ of Error — Notice.—Though verbal notice of intention to sue out a writ of error has been given him, one may serve a copy of a motion to dismiss the suit, submit at the same time briefs on the merits and on the motion, and appear generally to file the motion, without waiving service of the notice mentioned in Rev. St. 1889, § 2290, which requires written notice of the suing out of a writ to be served on the adverse party 20 days before the return day thereof.—KENNEE V. DOE RUN LEAD CO., Mo., 42 S. W. Rep. 683.

9. ASSIGNMENT FOR CREDITORS — Leasehold.—Where an assignee for creditors takes possession of a leasehold before the levy of any distress warrant by the landlord for rent, the landlord has no prior lien, but must share *pro rata* with other creditors.—RAND V. FRANCIS, Ill., 48 N. E. Rep. 159.

10. ATTACHMENT — Fraudulent Transfer.—Where an attachment was issued on the ground, among others, that the defendant had disposed of his property, in whole or in part, with intent to defraud his creditors, and in resistance of a motion to discharge the attachment there was undisputed proof of admissions by the attachment defendant that he had made such a transfer of the nature charged that no execution against him could be collected, held, that there exists no reason for assuming that the transfer must have been made subsequent to the commencement of the attachment suit, in view of the fact that the attachment defendant himself placed no such limitation on his own admissions of the fraudulent transfer in question.—NEBRASKA MOLINE PLOW CO. V. FUEHRING, Neb., 72 N. W. Rep. 1003.

11. ATTORNEYS — Assisting in Prosecutions.—Where defendant approved of plaintiff's employment in his behalf, any errors in the admission of testimony regarding the employment, in an action for the services, were harmless. 3 How. Ann. St. § 557, and 1 How. Ann. St. § 560, prohibiting a prosecuting attorney from having assistance of counsel who has received compensation from persons interested in prosecuting defendant, or who is interested in a civil action depending directly or indirectly upon the state of facts charged against defendant, do not prohibit the employment by a corporation of an attorney to assist in the preliminary examination of one of its employees charged with embezzlement.—MCCURDY V. NEW YORK LIFE INS. CO., Mich., 72 N. W. Rep. 996.

12. ATTORNEYS — Authority.—General retainer of an attorney in a suit to establish title to and to enforce

claim against a responsible party, and a note amply secured by trust deed, does not authorize him to surrender the same in exchange for a bond of doubtful value.—McCLINTOCK v. HELBERG, Ill., 48 N. E. Rep. 145.

13. BANKS — Authority of President.—In the absence of evidence to the contrary, it will be presumed that the president of a bank has authority to offer a reward for information leading to the arrest of a defaulting teller.—BANK OF MINNEAPOLIS, MINN., v. GRIFFIN, Ill., 48 N. E. Rep. 154.

14. BANKS — Insolvent Debtor—Appropriation of Deposit.—A holder of bank stock placed it in the hands of the bank's cashier for negotiation. The cashier obtained a loan on the stock, and was advised by the owner to remit the proceeds to him. The owner was at the same time indebted to the bank, and the cashier, without authority, deposited the proceeds in the bank, by which it was appropriated in payment of the indebtedness: Held, that the bank was chargeable with notice of the cashier's fraud, and could not make the appropriation.—WINSLOW v. HARRIMAN IRON CO., Tenn., 42 S. W. Rep. 698.

15. BANKS — Payment of Check on Forged Indorsement.—The drawer of a check delivered it to one who had applied for a loan as agent of the payee, and who gave the drawer notes and a trust deed purporting to be signed by said payee; but the latter had not authorized the transaction, and never received the check, which was paid by the drawee bank on a forged indorsement of the payee's name: Held, that the liability of the bank was to the drawer of the check, since it never became the property of the payee.—FIRST NAT. BANK OF CHICAGO v. PEASE, Ill., 48 N. E. Rep. 160.

16. BENEVOLENT SOCIETY—Beneficiaries—By-laws.—A by-law of a benefit association providing that death benefits should only be payable to kinsmen and those dependent on the deceased member is violative of Laws 1893, p. 130, § 1, which provides that such benefits shall be payable to an affianced husband or wife; and where the deceased directed, in his application, that the benefit should be payable to his affianced wife, though the society had refused to issue him a certificate naming her as the beneficiary, she can maintain an action therefor.—WALLACE v. MADDEN, Ill., 48 N. E. Rep. 181.

17. BENEVOLENT SOCIETIES—Enforcement of Rights.—The general rule is that, to secure property rights or enforce money demands against a social or beneficial organization, the member may, in the first place, prosecute his claim in the civil courts. The exception is where the constitution of the defendant body contains an express agreement binding its members first to seek their rights in the tribunals of the order before bringing an action at law. In this case there was no such agreement or provision which entered into the contractual relation between the parties, and therefore a suit at law will lie.—ROXBURY LODGE, NO. 184, I. O. O. F., v. HOCKING, N. J., 38 Atl. Rep. 693.

18. BENEVOLENT SOCIETY—Insurance — Declaration as to Age.—The declaration of his age, made by an applicant in his petition for membership in a beneficial society, which has been accepted, and a beneficiary certificate issued, and the required payments made and received for a series of years, will be presumed to be correct, until the presumption is overcome by competent proof.—SUPREME COUNCIL OF GOLDEN STAR FRATERNITY v. CONKLIN, N. J., 38 Atl. Rep. 659.

19. BILLS AND NOTES—Indorsement. — Defendant, before signing his name on the back of a note, stated that he indorsed the note because he believed the maker to be good, and that the payee must exhaust the maker before he collected from defendant. The payee assented to this: Held, that defendant was an indorser, and not a guarantor. — MILLIGAN v. HOLBROOK, Ill., 48 N. E. Rep. 158.

20. BOUNDARIES—Location of Surveys. — Where only the exterior lines of a batch of surveys made in the name of the same warrantee are located, the interior lines separating the individual tracts are to be ascertained according to the rules applicable to the "block system" by reference to monuments made or adopted in the exterior lines; but, where there are marks of the original survey made or adopted for each of the tracts, sufficient to fix the position of their lines on the ground, each tract must be located by following the footsteps of the surveyor, as nearly as the marks he has left behind him will permit. — MORRISON v. SEAMANS, Penn., 38 Atl. Rep. 710.

21. BOUNDARIES—Owners' Agreement.—Where owners of adjoining lands agree upon the dividing line, take and hold possession of their respective tracts, and improve the same in accordance therewith, each party will be estopped from afterwards asserting that the line so agreed upon is not the true line, although a sufficient time has not elapsed to raise the bar of the statute of limitations. — ST. BEDE COLLEGE v. WEBER, Ill., 48 N. E. Rep. 165.

22. BUILDING AND LOAN ASSOCIATION — Loan Associations—Insolvency—Borrowing Member.—As the basis on which a borrowing member will be allowed to redeem mortgaged premises from an insolvent loan association, he will be charged with the money actually received, with interest thereon to the time of the insolvency, and be credited with the interest paid on the amount received and the premium, and with interest calculated on the installments of interest paid on account of the premium from the time of each payment.—MORAN v. Gray, N. J., 38 Atl. Rep. 668.

23. CARRIERS — Delivery of Freight — Contract. — A carrier may contract that goods destined for a station at which the business does not warrant any building or agent, and at which there is none, shall be left on the platform, without any further responsibility on its part.—ALLAM v. PENNSYLVANIA R. Co., Penn., 38 Atl. Rep. 709.

24. CARRIERS OF PASSENGERS — Contributory Negligence. — It is not contributory negligence *per se* to alight from a slowly-moving horse car, and, when personal injury and a suit for damages result from so doing, it should be left to the jury to determine, from all the evidence, whether the proximate cause of the accident was the plaintiff's own negligence, or a want of proper care in the control and management of the car. —NEW JERSEY TRACTION CO. v. GARDNER, N. J., 38 Atl. Rep. 669.

25. CARRIERS OF PASSENGERS — Negligence. — A railroad company owes to one standing to it in the relation of a passenger, who must necessarily cross its tracks at a way station to reach his train, a higher degree of care than that due to mere trespassers or strangers; and the passenger has a right to rely on the exercise of such care by the company.—WARNER v. BALTIMORE & O. R. Co., U. S. S. C., 18 S. C. Rep. 68.

26. CONSTITUTIONAL LAW—Municipal Courts.—Within the limits of the constitution, the legislature may enact laws defining the jurisdiction and powers of all courts in the State; but such a law, to be valid, must be uniform as to all courts of the same grade, wherever situate.—STATE v. MAGNEY, Neb., 72 N. W. Rep. 1006.

27. CONTEMPT—Custody of Court House.—For one to change the locks on the door of the court room, during adjournment of the court, and thereafter refuse to allow the judge of the court and his officers, and the parties to the suit on hearing before him, to enter the court room, is a contempt.—DAHNKE v. PEOPLE, Ill., 48 N. E. Rep. 137.

28. CORPORATIONS—Mortgages—Estoppel.—In avoidance of a mortgage executed by it, a corporation cannot deny its authority to take and hold the mortgaged premises.—BUTTERWORTH & LOWE v. KRITZER MILLING CO., Mich., 72 N. W. Rep. 990.

29. CRIMINAL LAW—Arson—Indictment.—Under Code, §§ 985, 986, as amended by Acts 1885, ch. 42, making it an offense to set fire to certain kinds of buildings, "whether such buildings shall then be in possession of the offender or in the possession of any other per

son," it is not necessary to allege that the burned building was "in possession of" some person named.—STATE v. DANIEL, N. Car., 28 S. E. Rep. 255.

30. CRIMINAL LAW—Burglary.—Where a burglary is alleged to have been committed on premises occupied by a tenant, evidence that the owner of the premises had notified defendant to stay away is inadmissible, since, if defendant has the consent of the tenant, express or implied, his entry on said premises is justified.—TREVENIO v. STATE, Tex., 42 S. W. Rep. 594.

31. CRIMINAL LAW—Forgery.—Where two joint executors have money of their testator's estate on deposit in bank, which it is agreed shall not be drawn except upon the check of both of the executors, and one of them procures his co-executor to sign checks upon the bank drawn to the order of certain creditors to pay claims against the estate, and after receiving them for the purpose of attaching his own signature, and delivering the same to the creditors, adds his own signature thereto as executor, and erases from the body of the checks the names of the payees, and writes therein his own name individually, and draws the money from the bank, and then settles with the several payees at a less sum than their actual demands, and applies the difference to his own use, the executor profiting by such acts, if done with intent to defraud, is guilty of the crime of forgery.—ROHR v. STATE, N. J., 38 Atl. Rep. 673.

32. CRIMINAL LAW—Gaming—Betting on Horse Races.—Where a horse race is run within an inclosure, betting on it while without the inclosure is a violation of Mill. & V. Code, pt. 4, ch. 9, art. 6, relating to gaming, and the punishments therefor, as amended by Acts 1891, ch. 115, § 2, providing that horse racing on a track made or kept for the purpose, and inclosed by a substantial fence, is not within the prohibition of the article, but that it shall be unlawful gaming to bet in any way on any horse race, unless the track on which the race is run be inclosed by a substantial fence, and the bet or wager be made within said inclosure on a race to be run within said inclosure.—DEBARDELABEN v. STATE, Tenn., 42 S. W. Rep. 684.

33. CRIMINAL LAW — Homicide — Trial.—Where the homicide is the result of a quarrel, which only occupied a brief space of time, it is error to allow the State to give only the immediate facts of the killing, to refuse to allow defendant to ask the witnesses on cross-examination as to the origin of the difficulty, and then to prevent the defendant from giving his version of the quarrel after the State has given its version of the transaction in rebuttal.—SHUMATE v. STATE, Tex., 42 S. W. Rep. 600.

34. CRIMINAL LAW—Trial.—It is reversible error for the jury, after retiring, to listen to statements of one of their number as to the credibility of a material witness, and to discuss the failure of the defendant to testify.—TATE v. STATE, Tex., 42 S. W. Rep. 595.

35. CRIMINAL LAW — Trial—Instructions.—A charge only defining the different degrees of murder in general terms is insufficient where the evidence of guilt is conflicting, as the contentions of the parties should be stated, and there should be an array of facts, and an instruction as to what law is applicable, if the jury find according to either of the contentions, in view of Code, § 413, providing that the judge "shall state in plain and correct manner the evidence given in the case, and declare and explain the law arising thereon.—STATE v. GROVES, N. Car., 28 S. E. Rep. 262.

36. DAMAGES—Personal Injuries—Mental Disorder.—When an actionable wrong, consisting of or accompanied by personal injury, is committed, the jury, in fixing the damages therefor, are generally entitled to consider the mental agitation and disorder of the plaintiff naturally and proximately resulting from the wrongful conduct of the defendant.—LAMBERTSON v. CONSOLIDATED TRACTION CO., N. J., 38 Atl. Rep. 684.

37. DEDICATION—Acceptance.—Where an owner of land adjoining a town dedicated to public use an alley between his land and the town, the fact that he thought the alley an advantage to himself, because it allowed him to maintain an independent boundary, did not affect the validity of the dedication.—FAIRBURY UNION AGRICULTURAL BOARD v. HOLLY, Ill., 48 N. E. Rep. 149.

38. DEED—Bona Fide Purchaser.—A charge that a grantee of a deed did not pay any part of the consideration recited therein was not prejudicial, where the court further stated that the grantee executed a note for the accommodation of the grantor for the amount of said recited consideration, such fact being shown by uncontradicted evidence.—HIRSCH v. JONES, Tex., 42 S. W. Rep. 604.

39. DEED—Construction.—The defendant acquired its right of way over plaintiff's land by deed which in terms released the defendant from all damages by reason of the location, grade, construction, maintenance, and operation of a railway over and upon the premises conveyed: Held, that the deed only released the defendant from all damages resulting from a reasonable and non-negligent construction of a railway over and upon the premises conveyed.—JUNGBLUM v. MINNEAPOLIS, N. U. & S. W. R. Co., Minn., 72 N. W. Rep. 971.

40. DEED—Description of Property.—A deed, by a granddaughter of J, of "all the right, title and interest * * * which I have or may have to any portion of the estate * * * which I inherit or hereafter may be entitled to from my father, * * * and which he derived or inherited from his father, the said J," will convey all the interest she has in the estate of her grandfather; the clause describing it as inherited from her father being rejected as false description, he having died shortly before her grandfather, whose will made provision for him.—LANGLEY v. HONEY, R. I., 38 Atl. Rep. 699.

41. DEED—Headright Certificates—Transfer.—An instrument conveying all the right, title and interest of the grantors in a certificate of headright passes whatever interest they may have therein, whether such headright has been located or not.—MCCOY v. PEASE, Tex., 42 S. W. Rep. 659.

42. DIVORCE—Failure of Support.—Mere failure to support wife and family is not ground for divorce, where the husband endeavored in good faith to procure employment, although unsuccessful.—LORING v. LORING, Tex., 42 S. W. Rep. 642.

43. ELECTIONS — Preparation of Ballots.—Rev. St. 1894, § 6222, provides that the board of election commissioners shall cause the names of all candidates to be printed on one ballot; all nominations of any party "being placed under the title and device of such party * * * as designated by them in their certificate." Section 6215 provides that in case of death, resignation or removal of any candidate subsequent to nomination, "unless a supplemental certificate or petition for nomination be filed, the chairman of the * * * committee shall fill such vacancy:" Held, that where two parties nominate a separate set of candidates, and a part of each set having declined the nomination, each party completes its list at a subsequent convention, and files a supplemental certificate, the election commissioners have no right to ignore such certificates and print, under the title and emblem of each party, only the names of those nominated at the first conventions.—COUNTY BOARD OF ELECTION COM'RS v. STATE, Ind., 48 N. E. Rep. 226.

44. ELECTION CONTEST — Certificate of Nomination.—The Australian Ballot Act, § 10 (3 Starr & C. Ann. St. pp. 565, 566), provides that the certificate of nomination shall be filed with the county clerk at least 30 days before the day of election, and that, when filed, and in apparent conformity with the act, it "shall be deemed valid, unless objection thereto is duly made in writing:" Held, that where no objection was filed to a certificate of nomination for a county office, that provision of the act requiring the nominating convention to represent a political party which, at the general election next preceding, polled at least 2 per cent.

of the entire vote cast in the county, would be considered as being merely directory.—SCHULER v. HOGAN, Ill., 48 N. E. Rep. 195.

45. EMINENT DOMAIN—Taking Property for Public Use.—The laying out of a highway across a railroad is a taking of the company's property for public use and entitles it to compensation therefor, and compensation for such taking includes the making good to the company the moneys expended by it in erecting, maintaining and operating gates at the crossing, provided such gates are necessary for the proper protection of the public and for the safe operation of the company's railroad.—PATERSON, N. & N. Y. R. CO. v. MAYOR, ETC. OF CITY OF NEWARK, N. J., 38 Atl. Rep. 689.

46. EQUITY — Accounting — Jurisdiction.—The purchaser of certain letters patent agreed to retransfer them, unless he complied with certain conditions of the sale. Subsequently the seller agreed to perform certain services for the purchaser: Held, that in a suit by the seller for an accounting and a retransfer of the patents, equity would take cognizance of certain claims of a purely legal nature arising under the second contract.—GLEASON & BAILEY MANUFG. CO. v. HOFFMAN, Ill., 48 N. E. Rep. 143.

47. EQUITY—Jurisdiction.—A court of equity has no jurisdiction of a bill by a creditor of an insolvent estate of a decedent, of which no administrator has been appointed, to set aside a fraudulent conveyance by the decedent, and for the appointment of a receiver, thereby taking the administration of the estate from the probate court.—GOODMAN v. KOPPERL, Ill., 48 N. E. Rep. 172.

48. EVIDENCE—Parol Evidence.—The subject-matter of two proceedings in court was amicably adjusted, and two stipulations were signed by the parties discontinuing the cases. In one it was recited that the suit was discontinued "without costs to either party," and in the other "without costs." Held, that as the agreement was not set out in the stipulations, it could be shown by parol that part of the agreement of discontinuance was, that defendant was to pay the fees of plaintiff's counsel.—PATEK v. WAPLES, Mich., 72 N. W. Rep. 995.

49. EVIDENCE—Personal Injuries—Declarations.—The declarations of a person as to his symptoms, made to a physician or surgeon, not for the purpose of treatment but for the purpose of leading the physician or surgeon to form an opinion to which he may testify as a witness for the declarant, in a suit brought by him for personal injuries, are not admissible in evidence at the instance of the declarant.—LAMBERTSON v. CONSOLIDATED TRACTION CO., N. J., 38 Atl. Rep. 688.

50. EXECUTION SALE.—The owner of a headright certificate for 640 acres sold an undivided 160-acre interest in it. Afterwards, 160 acres were surveyed for the original owner and were sold, on execution against him, to an innocent purchaser, before the conveyance of the 160-acre interest had been recorded: Held, that such purchaser took title to the entire 160 acres.—WEST v. LOEB, Tex., 42 S. W. Rep. 612.

51. FEDERAL COURTS—Diverse Citizenship.—In an action where jurisdiction depends on diverse citizenship, and where the interests of certain defendants, whose citizenship is not such as to confer jurisdiction are separable from those of the others, plaintiff may before judgment, dismiss the action as to them, and the objection arising out of their citizenship cannot thereafter be raised by the others as to whom the necessary diversity exists.—MASON v. DULLAGHAM, U. S. C. C. of App., Seventh Circuit, 82 Fed. Rep. 689.

52. FRAUD—Attachment—Intent.—It is necessary to the validity of an adjudication of fraud in contracting a debt by misrepresentation of the collectibility of assets, where the proof is the alleged admission of the debtor, that enough details of time, circumstances and substance of language of the admission should be proved to establish that there was intentional falsehood in the representation.—LIVERIGHT v. GREENHOUSE, N. J., 38 Atl. Rep. 697.

53. FRAUDULENT CONVEYANCES—Preferring Creditors—A mortgage given by a failing debtor for the actual amount of a *bona fide* indebtedness, without any secret trust for the debtor's benefit, or an unreasonable postponement of the time for payment, and without fraudulent intent on the part of the creditor, is valid, though it defeats other creditors.—UNION NAT. BANK OF CHICAGO v. STATE NAT. BANK OF ST. JOSEPH, MO., Ill., 48 N. E. Rep. 169.

54. GUARDIAN AND WARD.— Where an independent executor under a will bequeathing property to minors has himself appointed guardian of such minors, qualifies and acts as such, and afterwards misappropriates such property, the sureties on his bond as guardian, cannot claim that he held such property as executor. GILLESPIE v. CRAWFORD, Tex., 42 S. W. Rep. 621.

55. HUSBAND AND WIFE—Deed.—Where land of a married woman is sold in order to invest the proceeds in other land, and such investment is made the same day that the first land is paid for, the mere fact that such payment was made by check to her husband's order does not constitute a conversion of the property by him, so as to subject it to his debts.—NORTON v. REED, Tenn., 42 S. W. Rep. 688.

56. HUSBAND AND WIFE—Separation Agreements.—In a contract of separation, stipulations by each party to release to the other "all interest, right and title to any and all real estate" owned by the other at the time of the marriage, are based upon a valid consideration, and operate as a release by the husband of his right of dower.—LUTTRELL v. BOGGS, Ill., 48 N. E. Rep. 171.

57. INJUNCTION—Bond—Receivers—Surrender of Assets.—An injunction issued without bond, restraining defendants from proceeding to sell goods seized by a writ of attachment, is a nullity, under 2 How. Ann. St. § 6687, providing that "no injunction shall issue to stay the trial of any personal action in a court of law until the party applying therefor shall execute a bond with one or more sureties to the plaintiff in such action, in such sum as the circuit judge · · · shall direct."—LAWTON v. RICHARDSON, Mich., 72 N. W. Rep. 988.

58. INJUNCTION—Insurance Company.—Where an insurance company has built up a large and successful business in the State, and has valuable property and numerous policies therein, the act of the State superintendent of insurance who is personally insolvent, in illegally refusing it a license to continue in business, and threatening to institute criminal proceedings against it, warrants a court of equity in interfering to enjoin the threatened injury, but the State officers will not be enjoined from bringing a suit in *quo warranto* to test the right of the company to do business in the State.—MUTUAL LIFE INS. CO. OF NEW YORK v. BOYLE, U. S. C. C., D. (Kan.), 82 Fed. Rep. 705.

59. INSOLVENCY—Preferences—Confession of Judgment.—Whether or not the holder of a confessed judgment is barred by the eightieth section of the corporation act from obtaining a preference over the other creditors of an insolvent corporation depends, not upon the intention with which the bond and warrant of attorney were given, but upon the intention with which the judgment itself was confessed. If the object to be attained, in confessing the judgment, was to give the holder thereof a priority over other creditors, the consequences provided by the act necessarily follow, notwithstanding the fact that at the time of the execution of the bond and warrant of attorney, no intention to prefer existed.—CONSOLIDATED COAL CO. v. NATIONAL STATE BANK OF CAMDEN, N. J., 38 Atl. Rep. 658.

60. INSOLVENCY—Sales by Assignee.—The grantee of a purchaser at an assignee's sale in insolvency proceedings, cannot avoid a mortgage placed upon the property before the assignment by the insolvent debtor, upon the ground of fraud or want of consideration in the inception of the mortgage, where the assignee advertises the property for sale subject to the mortgage, accepts bids on such condition and by con

sent of the court sells accordingly.—NEW PRAGUE MILLING CO. v. SCHREINER, Minn., 72 N. W. Rep. 963.

61. INSURANCE — Conditions—Waiver.—A stipulation in a policy of fire insurance that the same shall become void if the property "be or become incumbered by a chattel mortgage," is binding where the company has no actual knowledge of an incumbrance when the policy is issued, though there be a chattel mortgage then on record, and though no written application for insurance is made and no questions are asked regarding incumbrances.—CRIKELAIR v. CITIZENS' INS. CO., Ill., 48 N. E. Rep. 167.

62. INSURANCE — Interest.—One may insure his own life in favor of one having no insurable interest therein, unless such insurance is taken for the purpose of avoiding the law against wager policies.—CROSSWELL v. CONNECTICUT INDEMNITY ASSN., S. Car., 28 S. E. Rep. 200.

63. INSURANCE — Materiality of Representations.—In an application for a policy providing that it should be void if insured has concealed or misrepresented any material fact concerning the insurance, a building was stated, but not warranted, to be from 20 to 25 years old, when, as a fact, it was originally built more than 60 years before, but was practically rebuilt about 35 years afterwards: Held that, in the absence of a showing that there was any material difference between the value of the building after it had been partially rebuilt and what its value would have been had it been entirely rebuilt at that time, the materiality of the misrepresentation was for the jury.—MANUFACTURERS' & MERCHANTS' INS. CO. v. ZEITINGER, Ill., 48 N. E. Rep. 179.

64. INSURANCE — Notice — Other Insurance.—Knowledge continuing on the part of an insurance company of other insurance on the property insured constitutes a waiver of a condition printed in the policy that such other insurance must be made known to the company, and indorsed on the policy, or the policy shall be void.—MUTUAL FIRE INS. CO. OF LOUDOUN COUNTY v. WARD, Va., 28 S. E. Rep. 209.

65. INSURANCE—Representations by Assured.—Where the assured told the local agent who filled in the answers to the questions in the application that he had previously lost property by fire, and the agent, on learning that the fire did not originate on the premises of the assured, directed him to answer "No" to the question whether he had ever had property burned, the company cannot avoid the policy for misrepresentation, unless it shows special limitation on the powers of the agent, of which the assured had, or should have had, knowledge.—FARMERS' & MECHANICS' BENEV. FIRE INS. ASSN. v. WILLIAMS, Va., 28 S. E. Rep. 214.

66. LANDLORD AND TENANT—Destruction of Premises by Fire.—The tenant of a rented house is liable for the stipulated rent to the end of his term, although the house, before the expiration of such term, be destroyed by fire, unless the landlord does acts which in law amount to an eviction of the tenant.—FLEMING v. KING, Ga., 28 S. E. Rep. 239.

67. LANDLORD AND TENANT — Lease — Surrender of Term.—A surrender of a term in demised premises, by act and operation of law, will not be implied upon proof that the lessee has put a third person in possession thereof, and that the lessor has received rent from such third person, and nothing more. *Quære:* Will such surrender be implied, if it also appears that the lessor, with the lessee's assent, has accepted such third person as his tenant?—DECKER v. HARTSHORN, N. J., 38 Atl. Rep. 678.

68. LIBEL — Privileged Communications.—A communication relating to a business matter in which the party making it is interested, and sent only to persons concerned in the matter, being privileged, recovery cannot be had thereon in the absence of proof of malice and of actual damage.—GULF, ETC. RY. CO. v. FLOORE, Tex., 42 S. W. Rep. 607.

69. LIEN—Brickmaker's Lien.—One who furnishes board to employees of a brick manufacturer, under a contract with the latter, does not perform labor or furnish materials for making the brick, within Pub. St. ch. 141, § 11, providing that if a person, by himself or others, perform labor or furnish materials for making brick by virtue of a contract with the owner, he shall have a lien, etc.—PERREAULT v. SHAW, N. H., 38 Atl. Rep. 724.

70. LIMITATIONS — Final Judgments.—A judgment rendered in foreclosure proceedings, and "retained for further directions," is final as to adjudging the recovery of money, so that the running of limitations begins at the date of its rendition.—MCCASKILL v. MCKINNON, N. Car., 28 S. E. Rep. 265.

71. MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution, probable cause is, as a general rule, conclusively established by the fact that in the proceeding charged to have been instituted and carried on without probable cause the decision was adverse to the defendant therein despite the fact that such decision has been reversed, and such defendant has finally succeeded in the case.—ROOT v. ROSE, N. Dak., 72 N. W. Rep. 1022.

72. MARSHALING ASSETS.—Defendant, upon whose real estate there was a judgment lien, afterwards and at different times gave deeds of trust to secure creditors for various portions of such property, and suffered other judgments to be entered against him and executions to be levied on parts of the property. On the question of which of the junior lienors should bear the burden of the first lien, held, that the lands should be resorted to in the inverse order of their alienation; and this, although the judgment debtor acquired them at different times and from different sources.—MEEK v. THOMPSON, Tenn., 42 S. W. Rep. 685.

73. MASTER AND SERVANT — Fellow-servants — Negligence.—The conductor of a side-tracked train stood at the switch, according to a rule making it the duty of the conductor or flagman of a side-tracked train to close the witch, and then "signal on" the train on the main track, and gave the "all right" signal to the engineer of a train moving along the main track. The switch had been left open, and a collision followed, in which said engineer was injured: Held, that the conductor and said engineer were fellow-servants.—PLEASANTS v. RALEIGH & A. AIR LINE R. CO., N. Car., 28 S. E. Rep. 267.

74. MASTER AND SERVANT — Negligence—Fellow-servant.—A laborer was called from his special work, and, with others, directed by their foreman to raise by hand a large frame. Through lack of bracing or fastening, the frame fell, and injured him: Held (1) That he could not establish a right of recovery against his employer by proving that it is usual to have work of that sort done by a riggor with a derrick and appliances; (2) that the foreman was a fellow-servant with the laborers in the same common employment, and that his negligent use of, or failure to use, proper appliances provided by the master, did not entail liability on the master.—MCLAUGHLIN v. CAMDEN IRON WORKS, N. J., 38 Atl. Rep. 677.

75. MASTER AND SERVANT — When Relation Exists.—Defendant contracted with the owner of several teams and wagons to do its hauling at a specified sum per week. Defendant's name was lettered upon the wagons, but their owner was to employ and pay his own teamsters, and defendant exercised no control over them: Held, that defendant was not liable to a person injured through the negligence of the driver of one of such wagons.—FOSTER v. WADSWORTH-HOWLAND CO., Ill., 48 N. E. Rep. 165.

76. MECHANIC'S LIEN—Buildings on Contiguous Lots.—The defendant, as owner of three contiguous lots, containing in all less than one acre, entered into a written contract with plaintiffs to furnish materials and erect for him two houses, one on each of two of the lots, for a gross sum for both, with the right at his election, which he exercised, of adding to the contract

another house, to be erected on the third lot, at the same price *pro rata* as stipulated for the other two. All three of the houses were to be constructed of the same materials, and were to be completed within the same time. The plaintiffs erected the three houses pursuant to the contract: Held, construing Gen. St. 1894, § 6235, that it was not necessary, in order to perfect their lien, for the plaintiffs to file a separate lien upon each house, or to apportion the amount of their entire lien between the several houses, but that the balance due on the contract might be included in one lien statement, and a lien therefor claimed on all of the lots.—JOHNSON V. SALTER, Minn., 72 N. W. Rep. 974.

77. MINING CLAIMS — Application for Patent.—Occupants of lots in a town located on public lands of the United States, who have built on and improved the same, have a possessory right, which entitles them to contest the issuance of a patent to the claimant of a mining location covering such lots, though neither they nor the authorities of the town have taken any steps to secure title to themselves.—BONNER V. MEIKLE, U. S. C. C., D. (Nev.), 82 Fed. Rep. 697.

78. MORTGAGES — Authority to Receive Payment.—Authority of a mortgage company, successor to the business of dealers in mortgage securities, to receive payment for C of a mortgage which said dealers had taken in their own name, and assigned to C, and which B, treasurer of C, had in his possession, is not shown by the fact that it was practically the uniform practice of B to collect through the company the interest and principal of all mortgages procured from it or its predecessors in the business, either by authorizing it to collect specific claims, or by accepting from it money which had been paid it, and then discharging the mortgage.—CHURCH ASSN. OF MICHIGAN V. WALTON, Mich., 72 N. W. Rep. 998.

79. MORTGAGE — Growing Crops.—A mortgagor has the right to sever the rents from the reversion before foreclosure, and the granting of a lease constitutes such a severance as will give the lessee possession against the purchaser, and as will also give him the right of ingress and egress to gather and market the crops; and the fact that such lessee had notice of the mortgage when he leased the premises is immaterial.—BROWN V. LEATH, Tex., 42 S. W. Rep. 655.

80. MORTGAGE — Homestead.—The owner of a homestead conveyed it, without consideration, to a friend, who executed a trust deed on the property, and then reconveyed it. The agent of the lender had notice that the conveyance was made to evade the homestead law: Held, that the trust deed was void.—STEPHENSON V. YEARGAN, Tex., 42 S. W. Rep. 626.

81. MORTGAGES—Record.—One who acquires a mortgage without actual notice of a prior though unrecorded purchase-money mortgage, which latter was placed on record at the time of the recordation of the deed to the mortgagor, takes a lien subject to such prior mortgage.—CONTINENTAL INVESTMENT & LOAN SOC. V. WOOD, Ill., 48 N. E. Rep. 221.

82. MORTGAGE—Trusts.—A deed by a mortgagee of the mortgaged land, in trust for the benefit of M, and subject to her control and disposal during her coverture with G, and after her death in trust for G, on like condition, and on his death to their children, gives her the absolute power to dispose of the property covered by the deed (the mortgage debt and the lien), to the exclusion of the subsequent beneficiaries.—SLAUGHTER V. BERNARDS, Wis., 72 N. W. Rep. 977.

83. MORTGAGES—Usurious Loan.—A mortgage was tainted with usury, where the officer of the corporation to whom it was given, who consummated the loan, deducted a certain sum from the sum for which such mortgage was given, as such act of the officer must be imputed to the corporation whom he represented in such transaction.—CAMDEN FIRE INS. CO. V. REED, N. J., 38 Atl. Rep. 667.

84. MORTGAGE BY MARRIED WOMAN.—Where a married woman has executed a note and mortgage to secure the payment of a sum which, from the recitals in such note and mortgage, appears to have been loaned to her, and upon the faith of her separate estate, she is not entitled to impeach the transaction by showing that the papers were executed to secure the payment of her husband's debts, and not her own, unless she alleges in her plea, and proves, that at the time of their execution the lender knew that the transaction was merely colorable, and was a scheme or device by which her own property was pledged to the payment of the debt of her husband.—TEMPLES V. EQUITABLE MORTG. CO., Ga., 28 S. E. Rep. 232.

85. MORTGAGE FORECLOSURE—Defenses.—A breach of covenants in a deed against incumbrances or for good title is no defense against proceedings to foreclose a mortgage given on the land, for part of the consideration money, except in cases where there has been an eviction by title paramount or an action is pending to try the title to the mortgaged premises. A further exception exists where actual fraud in the transaction is alleged and proven.—FRENCHE V. MCCONNELL, N. J., 38 Atl. Rep. 687.

86. MORTGAGE FORECLOSURE—Judgment—Lien.—The judgment for money in an action on a note and to foreclose the mortgage securing it is *in personam* and final, so as to be a lien on other property of the defendant therein, though the judgment of foreclosure is not final.—MCCASKILL V. GRAHAM, N. Car., 28 S. E. Rep. 264.

87. MUNICIPAL CORPORATIONS—Bond Issues—Recitals.—"Where a municipal body has lawful authority to issue bonds, dependent only upon the adoption of certain preliminary proceedings, and the adoption of those preliminary proceedings is certified on the face of the bonds by the body to which the law intrusts the power, and upon which it imposes the duty, to ascertain, determine and certify this fact before or at the time of issuing the bonds, such a certificate will estop the municipality, as against a *bona fide* purchaser of the bonds, from proving its falsity to defeat them."—HEED V. COMMISSIONERS OF COWLEY COUNTY, KAN., U. S. C. C., D. (Kan.), 82 Fed. Rep. 716.

88. MUNICIPAL CORPORATIONS—Defective Sidewalks—Notice.—A city is not, as a matter of law, charged with notice of a defect in a sidewalk, consisting of a decayed plank, if it has existed for six months or more, and such sidewalk has been for such period in a dangerous condition, because of such plank being allowed to remain therein; but the question of notice is for the jury.—CITY OF DECATUR V. BESTEN, Ill., 48 N. E. Rep. 186.

89. MUNICIPAL CORPORATIONS—Public Improvements.—An assessment for a street improvement is not necessarily void for failure to assess certain property fronting on the line of the improvement, since the mere fact of contiguity is not conclusive evidence that such property was specially benefited.—HOLDOM V. CITY OF CHICAGO, Ill., 48 N. E. Rep. 164.

90. MUNICIPAL CORPORATIONS—Public Improvement—Special Assessment.—Injunction will not lie to restrain collection of a special assessment for a street improvement after the work has been accepted by the city, and the contractor paid, on the ground that the improvement was not done in accordance with the ordinance authorizing it; the proper remedy being *mandamus* to compel the city authorities to complete the work in the manner contemplated.—CALLISTER V. KOCHERSPERGER, Ill., 48 N. E. Rep. 156.

91. MUNICIPAL CORPORATIONS—Special Assessments.—Under Act April 15, 1875, § 1, providing that sidewalks may be constructed by special taxation "of the lot, lots, or parcels, of land touching upon the line where such sidewalk is ordered," an assessment may be made on any piece of land so lying, though it be part of an unplatted railroad right of way extending through the State.—ILLINOIS CENT. R. CO. V. PEOPLE, Ill., 48 N. E. Rep. 215.

92. MUNICIPAL IMPROVEMENTS—Assessments.—Private property cannot be assessed for an improvement, unless actually benefited thereby, and then only to the

extent of such actual benefit.—CITY OF CHICAGO v. ADCOCK, Ill., 48 N. E. Rep. 155.

93. NEGLIGENCE.—In the absence of a statute fixing the standard, no act of human conduct can be declared, as a matter of law, to be negligence, unless all the facts and circumstances are either admitted or are indisputable, and the inferences therefrom will admit of no contrariety of opinion among reasonable men, and the only inference is that the act evidences an entire disregard of care, and is shocking to the mind of a man of ordinary prudence.—IRVIN v. GULF, C. & S. F. RY. CO., Tex., 42 S. W. Rep. 661.

94. NEGLIGENCE—Proximate Cause.—Whether negligence is the proximate cause of an injury is a question of fact for the jury.—WEST CHICAGO ST. RY. CO. v. FELDSTEIN, Ill., 48 N. E. Rep. 198.

95. NEGLIGENCE—Trespasser.—An ascending and descending cage of an elevator may be said to be of such a character as to hold out an implied invitation to a five year old child to approach it and satisfy his childish curiosity, and thereby render inapplicable the rule relieving a private owner of property of liability for injuries sustained by strangers or trespassers from the unsafe condition of his property.—SIDDALL v. JANSEN, Ill., 48 N. E. Rep. 191.

96. NUISANCE — Liability of Tenant.—A tenant for years is not responsible in damages to a third person for maintaining and keeping in repair, upon the demised premises, a structure, erected thereon by his landlord prior to the commencement of his term, which operates to the nuisance of such third person. The remedy of the injured party is against the landlord alone.—MEYER v. HARRIS, N. J., 38 Atl. Rep. 690.

97. OFFICERS—Interest in Public Contracts.—Under Rev. St. 1894, § 2186 (Rev. St. 1881, § 2049), forbidding that certain officers shall "be interested directly or indirectly in any contract for the construction of any" public work, an indictment charging that such an officer became "interested in the construction of" certain public works, by "being connected with [another] as joint subcontractors" therein, was insufficient, since it does not show that any contract for the work had been let by the public authorities.—STATE v. FEAGANS, Ind., 48 N. E. Rep. 225.

98. OPTIONS — Stock Transactions — Contracts.—One employing another to act for him in buying or selling in a certain market will be held as intending that the business shall be conducted according to the general usage and custom of that market, whether or not he in fact knows of the custom.—TAYLOR v. BAILEY, Ill., 48 N. E. Rep. 200.

99. PLEADING—Authority of Agents.—Where plaintiff alleged that defendant owed him a certain sum as a yearly salary agreed upon, for services rendered, and defendant admitted that its agent employed plaintiff on its behalf to perform said services, but denied a contract to pay a yearly salary, it was not necessary for plaintiff to show that said agent had authority to make the contract as alleged.—CROSS v. ATCHISON, T. & S. F. RY. CO., Mo., 42 S. W. Rep. 675.

100. PRINCIPAL AND AGENT—Contract for Sale of Bonds.—An agent employed to sell bonds, who is ignorant of their legal *status*, has a right to presume that they are valid; and if he find a purchaser able and willing to buy at a price and on terms satisfactory to the owner of the bonds, and the sale fails because of their invalidity, the agent is entitled to his commissions, though by his contract he is to be paid only if the sale is effected, and the money realized therefrom by the seller.—BERG v. SAN ANTONIO ST. RY. CO., Tex., 42 S. W. Rep. 647.

101. PRINCIPAL AND SURETY—Notice.—Burns' Rev. St. 1894, § 1224 (Horner's Rev. St. 1897, § 1210), provides that one bound as surety on a contract in writing, upon which the right of action has accrued, may, by written notice, require the obligee "forthwith" to institute an action on the contract; and section 1225, Burns' Rev. St. 1894 (section 1211, Horner's Rev. St. 1897), provides that, if the obligee does not comply, the surety shall be discharged: Held, that notice to "sue the note which I signed as surety, . . . or I will not continue to be responsible as surety," is insufficient.—MCMILLIN v. DEARDORFF, Ind., 48 N. E. Rep. 233.

102. PROCESS — Service — Foreign Corporations.—An agent of a non-resident newspaper corporation, who is empowered to solicit advertisements, make contracts therefor, and receive payment, and who carries on the business at an office having the name of the newspaper on its windows, is "a managing agent," through whom the corporation may be served, under Code Civ. Proc. N. Y., § 432.—BREWER v. GEORGE KNAPP & CO., U. S. C. C., E. D. (N. Y.), 82 Fed. Rep. 694.

103. RAILROAD COMPANY—Authority of Chief Surgeon.—The chief surgeon of a railroad company has no implied authority to contract in its behalf for surgical attendance upon employees injured in the course of their employment.—BURKE v. CHICAGO & W. M. RY. CO., Mich., 72 N. W. Rep. 997.

104. RAILROAD COMPANY — Partnership.—Where the receiver of a railroad operates the same jointly with another railroad, paying the latter some proportion of the gross proceeds from the traffic thereon, the relation between the parties is that of lessor and lessee, and not that of partners.—HOUSTON & T. C. R. CO. v. MCFADDEN, Tex., 42 S. W. Rep. 593.

105. RECEIVER — Personal Contracts.—While a receiver is ordinarily, and from considerations of public policy, prohibited from purchasing as an individual, what he sells as receiver, or purchasing as receiver what he sells as an individual, yet, where the parties consented beforehand to such transaction, where the transaction was clearly for the benefit of the trust property, and the trust property has received the full benefit thereof, the parties cannot afterwards be heard to object to such transaction.—PATTERSON v. WARD, N. Dak., 72 N. W. Rep. 1013.

106. RECEIVER OF FOREIGN CORPORATION.—Whether, after a foreign corporation doing business in this State, has passed into the hands of a receiver in the State of its domicile, a receiver will be appointed in this State, and, if so, whether the domiciliary receiver will be appointed here, will depend upon the volume and kind of business done in this State, and whether any special interest of the creditors or citizens in this State is likely to be involved in the settlement of the insolvent affairs.—IRWIN v. GRANITE STATE PROVIDENT ASS'N, N. J., 38 Atl. Rep. 680.

107. REPLEVIN—Judgment.—It is proper to refuse an instruction substantially covered by other instructions. In replevin against a sheriff who had levied execution on the alleged partnership interest of the judgment debtor in property which plaintiff claims as sole owner, it is a good defense to show that the latter held himself out as partner of said debtor and represented to defendant that the debtor had a partnership interest in the property seized, though no partnership in fact existed.—JANES v. GILBERT, Ill., 48 N. E. Rep. 177.

108. SALE—Conditional Sales—Installments.—The delivery of a sewing machine under a contract providing for the payment of a certain sum in advance, and a certain sum each month for a certain number of months, may constitute a conditional sale, though such contract was denominated a "lease," and failed to provide that title should pass on payment of the last installment.—SINGER MFG. CO. v. GRAY, N. CAR., 28 S. E. Rep. 257.

109. SALES—Fraud of Buyer.—One relying upon the rating given by a commercial agency is not bound to examine the detailed statement made to the agency bythe person rated, to protect himself from fraudulent misrepresentations therein.—AULTMAN, MILLER & CO. v. CARR, Tex., 42 S. W. Rep. 614.

110. SUBROGATION—To Rights of Mortgagee.—One who makes a loan to discharge a first mortgage, pursuant to an agreement with the mortgagor that he shall

have a first mortgage on the same land to secure it, but there is at the time another mortgage on the land, of which the lender is ignorant, will be subrogated to the rights of the first mortgagee.—HOME SAV. BANK OF CHICAGO v. BIERSTADT, Ill., 48 N. E. Rep. 161.

111. TAXATION—Assessment.—In an action to foreclose a tax lien, the defendant cannot defeat the tax on the ground that the property was not sufficiently described in the assessment, when such description was furnished to the assessor by the defendant himself.—SCOLLARD v. CITY OF DALLAS, Tex., 42 S. W. Rep. 640.

112. TAXATION—Execution.—A tax collector has no authority of law to issue a tax execution against land *in rem* if its owner is in possession thereof at the time when it becomes the officer's duty, because of the owner's having made default in returning the land, to make a return for him.—NORRIS v. COLEY, Ga., 28 S. E. Rep. 222.

113. TAXATION—Privilege Tax—Cigar Stands—Exemption.—Under Acts 1897, ch. 2, § 14, providing that no one shall be exempt from the privilege taxes imposed by the act, "except as herein provided," there cannot be an implied exemption in favor of one who runs a cigar stand, because he also carries on another business that is licensed.—KNOXVILLE CIGAR CO. v. COOPER, Tenn., 42 S. W. Rep. 687.

114. TELEGRAPH COMPANIES—Negligence.—Where, in an action against a telegraph company for damages for not transmitting a message, the evidence shows a failure to transmit, and the only conflict in the evidence is as to delivery of the message to the company for transmission, it is proper to refuse to submit to the jury the question as to the company's liability for failing to deliver a message adressed to one who resides outside the company's free delivery limits.—WESTERN UNION TEL. CO. v. LYLES, Tex., 42 S. W. Rep. 686.

115. TRESPASS—Nonsuit—Damages.—The committing of a trespass upon the rights of another is *per se* a legal injury, from which some damage to the plaintiff will be inferred. In the absence of proof showing the amount of such damage, it is error to nonsuit the plaintiff. Nominal damages, at least, can be recovered.—LANCE v. APGAR, N. J., 38 Atl. Rep. 698.

116. TRIAL—Directing Verdict.—Where the facts are clear and undisputed, and conclusively show lack of authority in an agent, question as to his authority in a given particular being the matter in issue, it is the duty of the court to determine the issue by peremptory instruction to the jury; but the contrary is the rule if the evidence be doubtful or conflicting as to a material fact, or if the established facts admit of conflicting inferences determinative of the issue.—AMERICAN SAW CO. OF NEW YORK v. FIRST NAT. BANK OF TRENTON, N. J., 38 Atl. Rep. 662.

117. TRUSTS.—The trustee of a naked legal trust cannot, without the consent of the *cestui que trust*, compromise or yield an accrued right of the *cestui que trust*.—BIZZELL v. MCKINNON, N. Car., 28 S. E. Rep. 271.

118. TRUSTS — Estate of Deceased Trustee.—Where *cestuis que trustent*, on the death of their trustee, brought suit against the administrator of his estate for the recovery of the trust fund, and obtained a decree ordering payment thereof to the successor of such deceased trustee, with costs to be paid in the course of administration, from which decree such administrator prosecuted an appeal to the appellate court, pending which he died, whereupon the administrator *de bonis non* continued the prosecution of such appeal, finally to the supreme court, where the decree was affirmed, it was error, in a subsequent proceeding for an accounting as to such trust estate, to allow the administrator *de bonis non* for the costs incurred in such litigation in the circuit, appellate and supreme courts, including the printing of briefs and abstracts, out of such trust fund, instead of the estate of his intestate.—HAINES v. HAY, Ill., 48 N. E. Rep. 218.

119. USURY—Rights and Remedies.—While titles to property, made as part of a usurious contract, are void, the right to set up the usury and have the conveyance declared void, rests only with the maker and his personal representatives and privies. A stranger in interest will not be heard in an attack on a title claimed to be void for usury.—SCOTT v. WILLIAMS, Ga., 28 S. E. Rep. 243.

120. VENDOR AND PURCHASER—Auctioneers—Memorandum of Sale.—An auctioneer employed to sell land cannot bind the vendors by a memorandum signed by him some time after the sale, and after his authority has been revoked by the vendors to the knowledge of the vendee.—QUINZEL v. SCHMIDT, N. J., 38 Atl. Rep. 665.

121. VENDOR AND PURCHASER — Improvements.—An agent made a contract to sell land to defendant at a price less than he was authorized to sell it. He had sold other land in the same survey for the same owners, and had acted as their agent for years. Defendant, supposing the agent had full authority to sell as agreed upon, occupied the land for a year, making valuable improvements thereon, without being notified that said contract was invalid: Held, he was entitled to payment for the improvements he had made, where the owner refused to permit him to comply with the contract made with the agent. — VAN ZANDT v. BRANTLEY, Tex., 42 S. W. Rep. 617.

122. WAREHOUSEMEN—Loss of Goods — Negligence.—Where a plaintiff shows delivery of property to another for storage for hire, and failure to return the same upon demand, a *prima facie* case of negligence is established. But, if defendant thereupon shows that the failure to deliver is due to the "Act of God," the burden shifts to plaintiff to establish that the failure was due to loss through want of the exercise of ordinary diligence and care in the storage of the property.—AMERICAN BREWING CO. v. TALBOT, Mo., 42 S. W. Rep. 679.

123. WATER—Water Right—Easement.—Under a grant of lands and water privileges, the easement being of so much water as will operate a mill which is upon the lands conveyed, the grantee is entitled to the use of the water for any purpose he sees fit, provided the quantity used is not increased, and the change in the use does not prejudice the rights of others.—FOUNTAIN v. CITY OF PERTH AMBOY, N. J., 38 Atl. Rep. 676.

124. WATER COURSES — Pollution — Nuisance. — The pollution of a stream through the use of the same by a city for sewerage purposes, rendering the water unfit for domestic purposes and the watering of cattle, and causing the emission of noxious odors, is a public nuisance. — NOLAN v. CITY OF NEW BRITAIN, Conn., 38 Atl. Rep. 703.

125. WILLS—Construction—Nature of Estate.—Testator devised land to his wife, in trust for her use during her life, and at her death "to our child or children, their heirs and assigns;" and directed his wife, when his children became 25 years old, to pay over such portions of his estate equal in all to half of his estate, to be equally divided, and become the absolute portion of said children. He added a proviso that, in case of his wife's death following his, and the death of his children after his, without issue or surviving husband or wife, then his estate should be divided equally between his heirs and his wife's heirs. His wife and one child survived him: Held, that the estate vested in the child on the death of testator, and on the death of the child before his mother vested in her.—MCCONNELL v. STEWART, Ill., 48 N. E. Rep. 201.

126. WITNESS—Transaction with Decedent.—Where a bank sues an administrator on a note made by his intestate, plaintiff's cashier is incompetent, under Code, § 590, as a party in interest, to testify to an alleged conversation between himself and defendant's intestate, in which it was admitted that the note had not been paid. — MOREHEAD BANKING CO. v. WALKER, N. Car., 28 S. E. Rep. 258.